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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS Ex Rel. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT No. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

APPELLEES' BRIEF

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

APPELLEES' BRIEF

JURISDICTION.

The Court has noted probable jurisdiction of this case notwithstanding our previous motion to dismiss the appeal. This motion is now renewed.

The noting of probable jurisdiction by this Court does not broaden the issues to be decided here. Those issues are still limited to the errors assigned by the appellant in the

Supreme Court of Illinois and by Findings of Fact passed upon by that Court.

Rule 39 of the Supreme Court of Illinois requires in part that the brief of the appellant contain "a brief statement of the errors or cross-errors relied upon for a reversal" (393 Ill. 47). The statement of errors formed the issues in the Supreme Court of Illinois (*Pickard* v. *Rice,* 391 Ill. 615, 617, 63 N.E. 2d 743, (1945); *Harper* v. *Sallee,* 376 Ill. 540, 546, 34 N.E. 2d 860 (1941)) and the Court passed upon each of those issues and no others.

The opinion of the Court below first sets forth the four errors there urged by the appellant*. (Tr. 270; 396 Ill. 14, 18-19; 71 N.E. 2d 161, 163) and then discusses them

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*These four errors appeared on page 7 of appellant's brief in the Court below as follows:

ERRORS RELIED UPON FOR REVERSAL.

(1) The segregation of public school pupils into sectarian groups for the purpose of instruction in a public school is violative of federal and state constitutional guarantees of freedom of religion—the Fourteenth Amendment, and Article II, Section 3 and Article VIII, Section 3, of the Constitution of Illinois.

(2) The use of public funds for sectarian education violates Article II, Section 3 and Article VIII, Section 3, of the Constitution of Illinois, and Section 15-14 of the School Code of Illinois.

(3) Sectarian teaching of public school students in public school buildings during school hours is violative of Section 6-43 of the School Code of Illinois.

(4) The discretion of an administrative body and officer in this case is violative of Article II, Section 2, and Article III of the Constitution of Illinois, and is violative of the guarantees of due process of law and equal protection of laws by the Fourteenth Amendment to the Constitution of the United States.

seriatim (first error, Tr. 271-274; second, Tr. 274-275; third, Tr. 275-278, and fourth error, Tr. 278-279.)

By way of conclusion (Tr. 270), the Court below stated that the "simple question" before it was whether "either the Federal or State constitution, or both, *in their guaranty of religious freedom,* prohibit voluntary religious classes in the public schools under the plan as disclosed by this record". (Italics ours.)

It was after deciding the four specific questions and obviously referring to them that the Court held, generally, that there had not "been any violation of State and Federal guaranties". (Tr. 279.) This statement was a summary of the Court's decision and did not enlarge the issues passed upon.

The appellant in this Court sets forth three "Errors Relied Upon", which bear little if any resemblance in language or content to her "Errors Relied Upon For Reversal" in the State court. A reference to these errors she now relies upon (Appellant's Brief, p. 13) will be sufficient to show that they are a generalized and indefinite invocation of both the "establishment-of-religion" and "freedom-of-religion" clauses of the First Amendment and of the "due process" and "equal protection" clauses, and perhaps even the "privileges and immunities" clause, of the Fourteenth Amendment. No attempt is made by appellant to separate claims arising under one, from claims arising under others, and it is impossible to ascertain on which constitutional provision appellant relies for protection of any particular claimed right. Because of this it is necessary for us, in the interests of clarity and precision, to list the separate Federal questions raised or touched upon by the appellant. If we have erred in formulating this list it has been to broaden and expand these questions, rather

than to restrict them. We shall follow this classification in our discussion of both jurisdiction and merits.

The four possible Federal questions which might be considered here are:

First: Does the plan of using the school premises, because of the traffic hazard of sending the students to church buildings for released-time religious education, violate the establishment-of-religion clause of the First Amendment? (This question was neither raised nor decided below and may not be raised here for the first time.)

Second: Does the voluntary Champaign plan of religious education violate the freedom-of-religion clause of the First Amendment? (We contend that the Appellant suing as a taxpayer in her own behalf or vicariously in her son's behalf is not entitled to raise this question.)

Third: Do the facts that public school teachers handle parents' request cards and that school rooms are used, rent-free, for a few hours a week constitute a taking of property of appellant, as a taxpayer, for a private use in violation of the due process clause of the Fourteenth Amendment? (This question was not raised or decided below and, again, is not open to decision here.)

Fourth: Does the delegation of discretionary authority to the school superintendent and the claimed possibility that school authorities will in the future refuse to allow use of school facilities by certain religious groups constitute a violation of the Fourteenth Amendment? (The appellant cannot raise this point because the question is moot since there has not been and may never be any wrongful exercise of discretion.)

The opinion of the state court shows clearly that only the second and fourth of these Federal constitutional questions were raised below. By her first claim of error, below,

she alleged that the program violated her son's freedom of religion, and by the fourth that it violated the Fourteenth Amendment because of a supposed delegation of an unlawful discretion to an administrative officer.

That the first and third questions stated above were not raised below has already been admitted in this court. On page three of the appellant's brief on the motion to dismiss she stated:

> "Appellees further allege that Appellant did not rely on the First Amendment in presenting the case to the Supreme Court of Illinois, which obviously she did not".

Also, to appellee's previous contention that only the state constitution and not the Federal constitution was relied on in the state court as invalidating the use of public property for religious purposes, appellant replied (Brief Opposing Motion to Dismiss, p. 3):

> "Appellant [Appellee], however, is in error in saying that 'the attack on the use of public property was based solely upon Section 3 of Article VIII of the Illinois Constitution'. Weight was largely placed upon the State Statute."

There was thus no contention in the Illinois Supreme Court that either the Fourteenth Amendment or the First Amendment were violated by the use of school property. The effort to inject such an argument into the case at this stage is an afterthought generated by dicta in this Court's opinion in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947).

As to such second constitutional question it is to be noted that the sole petitioner was Vashti McCollum. She is the mother of James Terry McCollum, a school child involved in this controversy. It is his religious freedom which is alleged to have been violated. No claim is made

in this Court, nor was any claim made in the Illinois Supreme Court, that the petitioner's own religious freedom was restricted or violated.

The relator has no right as a taxpayer to complain of an infringement of the religious freedom of her son. The constitutional rights of citizens are personal, and it is a well-recognized rule that the constitutionality of a statute may only be attacked by one who falls within the class of persons upon which the law acts or operates, and not merely because it is unconstitutional as applied to others.

Cronin v. *Adams*, 192 U.S. 108, 114 (1904).

Hatch v. *Reardon*, 204 U.S. 152, 160 (1907).

The Winnebago, 205 U.S. 354, 360 (1907).

Standard Stock Food Co. v. *Wright*, 225 U.S. 540, 550 (1912).

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Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 282, 289 (1921).

Henneford v. *Silas Mason Co.*, 300 U.S. 577, 581 (1937).

Premier-Pabst Sales Co. v. *Grosscup*, 298 U.S. 226, 227 (1936).

The Illinois rule is the same—*Schreiber* v. *Cook County*, 388 Ill. 297, 58 N.E. 2d 40 (1944).

"Constitutional questions are not dealt with in the abstract"—*City of Elmhurst* v. *Buettgen*, 394 Ill. 248, 254, 68 N.E. 2d 278 (1946).

This rule is also applicable to complaints against administrative action. To invoke judicial power to determine the validity of executive action, one must show that he has sustained or is immediately in danger of sustaining a direct injury, and it is not sufficient that he has merely a general interest common to all members of the public.

Ex parte Levitt, 302 U.S. 633, 634 (1937).

That the appellant may not challenge the constitutionality of the Champaign plan on the theory that it violates her son's religious liberty is crystal clear from *Tileston* v. *Ullman*, 318 U.S. 44 (1943). There a licensed physician challenged the constitutionality of a Connecticut statute prohibiting him from prescribing the use of contraceptive devices for married women in cases where pregnancy would endanger life or health. He alleged that the statute would prevent his giving such professional advice to three patients whose condition of health was such that their lives would be endangered by child-bearing, and set out such danger in detail.

This Court said in a per curiam opinion (p. 46):

> "We are of the opinion that the proceedings in the state courts present no constitutional question which appellant has standing to assert. The sole constitutional attack upon the statutes under the Fourteenth Amendment is confined to their deprivation of life—obviously not appellant's but his patients'. There is no allegation or proof that appellant's life is in danger. His patients are not parties to this proceeding and there is no basis on which we can say that he has standing to secure an adjudication of his patients' constitutional right to life, which they do not assert in their own behalf. [Citing numerous cases]".

On this branch of our case, we would paraphrase the above language by saying:

> The attack under the freedom-of-religion clause of the First Amendment refers obviously not to appellant's religious liberty, but to her son's. There is no allegation or proof that appellant's religious liberty is violated. Her son is not a party to this proceeding and there is no basis on which to say that she has standing to secure an adjudication of her son's constitutional right, which he does not assert in his own behalf.

For the reasons given, the claim of the appellant that her son's religious liberty is violated does not present to

this Court any justiciable question under the freedom-of-religion clause of the First Amendment.

The remaining available point relates to the alleged unlawful delegation to the Board of Education and superintendent of schools of authority to allocate school rooms for religious education and to approve the teaching personnel. This claim sets up a straw man. Nothing whatever was said in the pleadings with reference to it and the only evidence giving it any color whatever is that referred to on pages 10 and 11 of appellant's brief. We leave for later discussion the evidence of the extent and nature of the control which the school authorities suggested that they had the right to exercise. The curriculum is not controlled by the school board, but by the organization employing the teacher.

The supposed delegation of legislative power to the school board or to the superintendent does not of itself raise a Federal question—*Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937). In that case, a Virginia statute delegating power to a Milk Commission to create market areas and establish maximum and minimum prices was assailed on the ground that the grant of discretionary power passed the limits of lawful delegation. This Court said, by Mr. Justice Cardozo (p. 612):

> "The Constitution of the United States in the circumstances here exhibited has no voice upon the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an act of Congress. How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. Nothing in the distribution here attempted supplies the basis for an exception. The statute is not a denial of a republican form of government. Constitution, Art. IV, sec. 4. Even if it were, the enforcement of that guarantee, according to the settled doctrine, is for Congress not the courts [citations]".

In accordance with the above authority, no Federal question is presented by appellant's argument that discretionary authority is vested in the superintendent of schools since no abuse of any discretion is alleged. Appellant must show that the exercise of discretion by the superintendent of schools deprives appellant of a constitutionally guaranteed right. This appellant fails to do. For instance, appellant's claim that the school authorities will "censor" religious views present no Federal question in the absence of evidence that they have already done so to the appellant's detriment. To complain of an unconstitutional law one must be the victim of it. *Lehon* v. *City of Atlanta*, 242 U.S. 53, 56 (1916). In that case a Louisiana citizen was convicted of failing to get a license as a private detective. Without having applied for a license, he contended that the ordinance requiring it was unconstitutional because local officers had refused to issue licenses to nonresidents of Georgia. This contention was rejected. A unanimous court, by Mr. Justice McKenna, said in conclusion (p. 56):

> "To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval".

To the same effect is *Bourjois* v. *Chapman*, 301 U.S. 183, 188 (1937).

On the question of this Court's jurisdiction, the only relevant consideration is that no attempt has been made by the school board and school superintendent to exercise any discretion whatever except freely to grant use of the school premises to every religious organization that has sought such use. It affirmatively appears in evidence that no request of any person, religious or irreligious, has been denied (Tr. 119, 120, 159; Trial Ct. Op., Tr. 66). Recognizing this state of the record, appellant based her third

assignment of error in this Court (Appellant's brief, pp. 13-14) not upon evidence that she or, indeed, anyone has been denied the free and equal use of school buildings, but, upon the mere supposition that in the exercise of their discretion, the school authorities will some time in the future deny her or someone such free and equal use of school facilities. This is obviously an attempt to invoke the jurisdiction of this Court upon a moot and supposititious question.

It has been established beyond cavil that in order to raise a constitutional question one must show that his constitutional right has been violated or threatened.

Since it is only the *acts* of the school authorities which are here challenged, the only question presented is whether those specific acts have violated the constitutional rights of the petitioner.

That no action taken by the Board of Education constituted an unlawful discrimination is clear. The Illinois Supreme Court found as facts that the Board of Education had made no choice among sects (Tr. 278) and that it had not exercised any discretion in reference to the powers granted (Tr. 278-279).

Precedents holding that in certain types of cases persons adversely affected by a statute may assert every ground of its invalidity are not relevant where validity of administrative conduct, only, is involved. The appellant relies upon *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) and *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) (Appellant's Brief, pp. 32-33). However, in both of these cases petitioners had been arrested under a statute or ordinance. Upon the petitioners' arrest in the cited cases, the constitutionality of the statute or ordinance was obviously a matter of direct concern to the petitioners. Neither a statute of

general application, nor an arrest or other direct violation of the appellant's rights, is involved in the instant case.

The above discussion disposes of the only Federal questions which were decided in the Court below. It is true that other matters are argued by the appellant in this Court but these are not preserved for review because they were not argued or decided by the Illinois Supreme Court. Thus, the claim that the use of school buildings violates the establishment-of-religion clause of the First Amendment was neither made nor decided in the Court below and is not available here—*Wilson* v. *Cook*, 327 U.S. 474 (1946). In that case this Court quoted (p. 483) with approval from *New York ex rel. Cohn* v. *Graves*, 300 U.S. 308, 317, a sentence which is precisely applicable to our case:

> "In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented."

The cases just cited make it clear that a decision under the freedom-of-religion clause of the First Amendment below does not reopen the case to a consideration of the establishment-of-religion clause which was not even mentioned below.

The appellant's original petition for mandamus was sufficient to raise the establishment-of-religion question (Tr. 4, p. 11; Tr. 8, par. 24), but the question was never raised in the Illinois Supreme Court (see the assignments of error, footnote, p. 2, above) and hence was abandoned —*Harper* v. *Sallee*, 376 Ill. 540, 34 N.E. 2d 860 (1941) holding (p. 546) that an appellant may only rely on the points stated by him as grounds for reversal.

That this is the state of the record was admitted by the appellant in her brief on the motion to dismiss (p. 3).

For the above reasons, no substantial Federal question which is open to consideration by this Court is here presented, and the appeal should be dismissed.

STATEMENT OF FACTS.

The importance of our setting forth a clear and uncolored statement of facts is highlighted by a liberal resort to semantics on the part of appellant. References to voluntary separation of children as "segregation", calling a distribution of cards on which parents may indicate that they want their children to attend religious education classes "solicitation", and describing the approval of the schedule of classes and the approval of teachers as "censorship" do not lead the Court to a correct understanding of this case.

The following statement of facts summarizes the evidence upon which the decision of this case must be based. All material facts stated below were unanimously found by the trial court of three judges and the Supreme Court of Illinois. For the convenience of this Court, we have keyed the more important facts to the transcript pages where findings made by these courts appear.

The plan involved in this controversy is a form of the weekday released time religious education program, which had its inception about thirty years ago in the city school system of Gary, Indiana, and which has enjoyed a remarkable growth until at the time of the trial of this case it was in operation in differing forms in over 1,000 school districts in 46 states (Tr. 160). Current estimates are that about 2,000,000 children participate in such programs.

Because the need for religious education has been widely recognized and the initiation of local programs has been spontaneous, the local movements are not unified into any national system or standardized program, and each community has introduced many variations dependent upon local conditions and needs. Nevertheless, some features of the plan are common throughout the nation. These include release of school children, upon request of their parents, from the jurisdiction and control of school authorities and from participation in the school curriculum, for periods not exceeding one hour per week. During this period a voluntary association, usually made up of representatives of all religious faiths in the community, provides teachers and lesson materials and conducts a course in the study of religion on an educational level at least equal to that of the school from which the children have been withdrawn. The object is to acquaint children with the history and factual content of religion on the same basis as other subjects such as philosophy, economics or history are taught in the school program, thus affording them a true and balanced picture of the relative place and importance of religion in life.

The obvious advantage that has accrued to agnosticism and atheism, as a result of secularism in public education, is thus sought to be checked and a proper balance restored to the competing ideas of atheism and religion, and of material values and spiritual values.

Religious teaching is not conducted as a part of the public school system. The participation of the school authorities is the temporary release of children from their control and jurisdiction while such children are voluntarily participating in the study of religion. As is the case in the program here under consideration, in some communities school buildings are used for these classes because of

the unavailability or impracticability of using other facilities. The school board does not participate in the plan in any other way. The plan is one formulated and carried out by the participating religious groups, not by the school board.

The plan was initiated in the City of Champaign, Illinois, in the fall of 1940, following a local increase in juvenile delinquency. As a measure intended to combat it (Tr. 158; Trial Ct. Op., Tr. 61), the Champaign Council of Religious Education, a voluntary association of Jewish, Roman Catholic, and Protestant faiths, was formed, and immediately sought of, and secured from the defendant Board of Education, permission to offer classes in religious education in grades 7 through 9 (later expanded to grades 4 through 9) throughout the Champaign school system (Tr. 157-158; 128-129; 127-128; Trial Ct. Op., Tr. 61; Ill. Sup. Ct. Op., Tr. 268).

The plan formulated and carried out by the Council of Religious Education envisaged furnishing instructors having educational background and experience at least equal to the standard established by the Board for its own teachers (Tr. 118) and all materials and books, as well as incidental expenses, at the expense of the Council (Tr. 118; Trial Ct. Op., Tr. 64, 70; Ill. Sup. Ct. Op., Tr. 268, 269, 272, 275). Children were to be admitted to these classes only upon the express written request of parents and then only to classes designated by the parents (Tr. 117, 130; Trial Ct. Op., Tr. 62; Ill. Sup. Ct., Tr. 268). They were to be excused by the Board from participation in the public school program and attendance in the grade schools (grades 4, 5 and 6) for 30 minutes and from the Junior High School (grades 7, 8 and 9) for a period of 45 minutes in each week, for participation in the religious education classes (Tr. 91; Trial Ct. Op., Tr. 62; Ill. Sup. Ct. Op., Tr. 268, 272).

Schoolrooms, not required for school purposes, were to be made available for use by the religious education classes because of the traffic hazards involved in transferring children to other available buildings remote from school buildings (Tr. 158, 242) and classes were to be scheduled so as not to interfere with the regular public school classes (Tr. 111, 112; Trial Ct. Op., Tr. 65; Ill. Sup. Ct., Tr. 277) after consultation with the public school teacher. Each faith, Catholic, Jewish and Protestant, was to have its separate instructional classes (Tr. 127-128, 118) and every group, religious and unreligious, was to be admitted on equal terms (Tr. 118, 119, 120; Trial Ct. Op., Tr. 62); and no expense in connection with the classes was to be borne (or has been borne) by the Board (Tr. 239, 241 Trial Ct. Op., Tr. 69-70, Ill. Sup. Ct., Tr. 274-275).

Additional groups, even atheists, were to be freely permitted to participate upon the same terms (Tr. 118, 119, 159; Trial Ct. Op., Tr. 65), and all have been fully admitted (Trial Ct. Op., Tr. 65). Lesson materials and curriculum were to be selected by a committee representative of all groups participating and in a manner to avoid any offensive, doctrinal, dogmatic or sectarian teaching (Tr. 102-107, 156, 157, 159, 162; Trial Ct. Op., Tr. 66, Sup. Ct. of Ill., Tr. 269). The teaching was to be of the content of the Bible without interpretation or attempt at influencing belief in the doctrines or creeds of any church (Tr. 105-106, 142, 156, 159-160, 161, 227; Trial Ct. Op., Tr. 66, Sup. Ct. of Ill., Tr. 269).

So popular did this program become that in the year of its operation immediately prior to the trial, 80% of the pupils in the grade school classes participated, 31 different faiths and denominations were represented by participating pupils (Tr. 168, 258-259), and *in the five years of its operation, no resident of the school district other than the*

relator voiced any complaint regarding it (Tr. 107, 130, 160, 225).

The son of relator, James Terry McCollum, at the time of the trial ten years of age, enrolled in the fourth grade at South Side School in the fall of 1943, and along with five others did not participate in the religious education class during the first semester (Tr. 174, 178, 182, 192). During the second semester, however, he did participate, procuring his mother's written permission therefor (Tr. 177, 178, 213, 214, 231). In the fall of 1944 he transferred at his mother's request and enrolled in fifth grade in Dr. Howard School and with one other youngster, Elwin Miller, did not attend the religious education class the first semester (Tr. 132, 174, 209). During the second semester he was alone in not participating therein (Tr. 132, 174).

During all of his school life he was viewed by his teachers and by his mother, appellant, as a maladjusted problem-child who got along poorly with his fellows (Tr. 134-135, 177, 198, 208-209, 210; Trial Ct. Op., Tr. 68). In Dr. Howard School, where he got a fresh start among pupils who were not acquainted with him, he frequently teased and fought with his classmates, often starting the fights himself and spitting in their faces and kicking them (Tr. 136, 176-177, 208).

When the other members of his class were attending the religious education classes he continued his regular studies in the music room under the supervision of his regular teacher and on one occasion was placed at a desk in the hall (Tr. 132, 175, 193, 255), where he was teased by passing children who apparently thought he was being punished (Tr. 175, 193). There is no pretense that they teased him about not attending religious education classes. Upon complaint of his mother, this practice was promptly and permanently discontinued, as was the one of placing him in

the music room, when his mother complained that he was a victim of claustrophobia (Tr. 172, 255, 257). He was thenceforth placed with another division of the fifth grade during these periods of religious education (Tr. 257) and no further complaint was made by his mother. His teacher, Mrs. Taylor, testified that her reason for not sending him to the other division in the first instance was that the boy might disturb the other class by seeking to attract attention to himself (Tr. 257). She did not wish to visit this distracting influence on another teacher (Tr. 255).

He did not complain of any embarrassment or coercion in connection with the religious education courses, nor did he contend that he was questioned, except by one boy, regarding his non-participation therein or teased regarding his religious beliefs or unbelief on any occasion (Tr. 185-186; Trial Ct. Op., Tr. 68). Neither did he attribute his failure to get along with his fellows to the existence of the religious education course (Tr. 185-186).

He testified that he had been teased about being an atheist, a fact he had told his cub scout friends about (184-186), but he was not teased about not taking religious education (Tr. 186).

His teacher and a number of classmates categorically denied that he was ever teased either about his atheism or his failure to participate in religious education classes (Tr. 135, 244, 245, 250, 255, 260-261, 263, 264, 265, 266; Trial Ct. Op., Tr. 68). Likewise fifteen children, some his classmates, some children in other classes in the school system, drawn indiscriminately from those who took the classes and from those who did not, and all of the public school teachers and religious education teachers denied that any embarrassment was felt or observed in either those who participated in the program or those who did not (Tr. 153,

154, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 259, 260, 261, 263, 265, 266; Trial Ct. Op., Tr. 66 & 68).

Both he and his mother are atheists (Tr. 184-185, 208). Her views are expressed in a pamphlet attached to her original complaint (Tr. 17-36). While the son expressed curiosity regarding religion (Tr. 134, 178, 193) his mother testified that she is unwilling to have him participate further in the classes as they conflict with her interpretation of a political doctrine denominated "separation of church and state" which she believes forbids the voluntary Champaign program above described (Tr. 193, 201, 211). She denied any religious scruples against the teaching of religious education and expressed her willingness to see it continued if the Court decided that her constitutional views were incorrect (Tr. 201-202).

The relator has other children, one of whom attends a private school which is opened with recitation of the Lord's Prayer, scripture reading and sacred hymn singing (Tr. 211). She enrolled James Terry in a model demonstration class at the University of Illinois during the summer of 1945 where similar opening exercises were held and in which he participated (Tr. 210; Trial Ct. Op., Tr. 67). She has no scruples or objection to her children taking part in these exercises (Tr. 209-211).

This suit was started by her, following a written demand that the Defendant Board of Education adopt rules and regulations excluding religious education instruction from the school buildings, which demand was signed by herself and certain unidentified persons, not residing in the district, who purport to represent unidentified organizations denominated, "Chicago Action Council" and "Civil Liberties" (Tr. 16-17), admitted, (Tr. 54). None of these unidentified persons appeared as witnesses on the trial of this case.

Because we can not know that the Court will dispose of this case upon jurisdictional grounds, as we believe it should, and because our examination of the briefs in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1 (1947) indicates that they did not fully inform the Court of the history of that portion of the First Amendment upon which the appellant seeks to support her first "error relied upon for reversal", we feel that it is necessary that we present to the Court a carefully detailed and historically accurate statement of the background and environment of the establishment-of-religion clause of the First Amendment as well as its legislative history and the legislative debates attending its passage.

We are the more impelled to do this because of the historical inaccuracies that have surrounded current public discussion, and the fact that the first direct judicial construction of the establishment of religion clause of the First Amendment has been delayed for nearly 160 years following its adoption. Such a responsibility will require space in this brief, which a lesser problem would not warrant, and is a responsibility which the advocate must approach with a lack of bias not ordinarily one of his virtues.

SUMMARY OF ARGUMENT.

I-A.

The Establishment of Religion Clause of the First Amendment does not prevent the free and non-discriminatory Use of Public Property for Religious Education classes.

This case involves an interpretation of the First Amendment, not of Madison's Remonstrance, the Virginia bill for religious freedom, or even of Jefferson's "wall of separation between Church and State."

The history of the establishment of religion clause indicates that the words "an establishment of religion" mean a religion which is preferred by law. The amendments proposed by the ratifying conventions and the various versions of the clause in the First Congress show no hostility toward religion. The intention was to prevent the establishment of a national religion having any sort of preference over any other religion. Legislative changes made were to prevent any claim that the amendment was hostile to religion or that Congress could interfere with existing state-favored religions.

The then existing state constitutions and common usage then and now indicate that "establishment", in its context, refers to a religion or sect favored by law over other religions or sects. The practical construction of the clause by Congress and the executive, and by state constitutions (which never use the "establishment of religion" language standing alone) shows that equal aid to all religion was not prohibited. If use of school property is forbidden, then all tax exemptions of religious institutions are invalid as laws "respecting an establishment of religion." The interpretation of the clause by the text writers and cases, except the dictum in the *Everson* case, 330 U.S. 1, is consistent with our definition of the clause.

The freedom of religion clause deals with individual rights; the establishment of religion clause deals with the relationship between government and religious organizations. Considering the expanded meaning which has been given to freedom of religion, the meaning of the word "religion" has there outstripped the meaning of "religion" when used to refer to a human institution. There is no incongruity about this. Freedom of religion deals with the human mind; establishment of religion deals with the relationship between government, organized religion, and individuals.

The establishment of religion clause only prevents preference for one religion over other religions. A tax may be an unconstitutional preference to one religion, not because it is a tax but because it is a preference.

The impartial use of public property for public worship and for voluntary religious education classes, under the constitution and statutes of Virginia, was approved by Thomas Jefferson. Such approval is very persuasive that, since there is no preference of one religion over another or of all religions over atheists in the actual operation of the voluntary Champaign plan of religious education, the establishment of religion clause is not violated.

I-B.

The "establishment of religion" clause of the First Amendment refers to a Nationwide Religion, and is not binding on the several states, particularly if construed to prevent the Type of Local Educational Activity Involved Here.

The assumption made by Court and counsel in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, that the establishment of religion clause is binding on the states is now challenged. If transformed from its historic meaning of preventing the establishment of a favored

religion and compelling observance of it by law, the constitutional clause is not enforceable on the states.

The Fourteenth Amendment does not impose the establishment of religion clause on the states. The meaning of establishment of religion as used in the First Amendment is "*national* establishment of religion", and, therefore, the right of national citizenship is the right to be free of a national religion. The First Amendment, like the Second relating to the right of the people to bear arms, was a division of power between state and Federal government.

The establishment of religion clause did not codify a nationwide disapproval of established religions. Several states then had state-favored churches.

What the Republican party failed to accomplish as a campaign issue in the Hayes-Tilden presidential campaign of 1876, after the adoption of the Fourteenth Amendment, is now sought to be accomplished by judicial decision. An overwhelming majority of state constitutions prohibit payments for sectarian purposes, and there is no need or justification for transferring the enforcement of such restrictions from the states to the Federal government.

The present case involves primarily questions of educational policy which the State of Illinois handles on the intimate level of local school boards, and under judicial decisions prohibiting all class, color or creedal discriminations, which decisions protect Illinois citizens without the acceptance of jurisdiction by this Court *via* the Fourteenth Amendment Route.

II.

The freedom of religion clause of the First Amendment does not prohibit the use of school buildings for religious education.

The classes are voluntary and no coercion or embarrassment due to the plan (which is not the plan of the school

board but of a voluntary group) is shown, Any embarrassment of appellant's son was not due to the classes. The law does not protect against any social consequences of choosing atheism. No tax burden on appellant was proved, and unmeasured, slight and indirect expense should be disregarded as a trifle.

III.

The use of school buildings for voluntary religious education classes and the handling of parents' request cards by teachers do not deprive the appellant of property without due process of law in violation of the Fourteenth Amendment.

Two courts have found that no forbidden expense is incurred and their finding of facts should be followed by this Court. The non-discriminatory use of public buildings by voluntary religious classes, whose pupils submit to no religious tests to enter, is as much a public purpose as the use of school buildings by the American Legion, art groups, civic bodies and those traditionally admitted thereto. The First Amendment has not absolutely quarantined religion from benefits of government. Persons having no religion have no constitutional right to prohibit exercise of religion by those who have.

IV.

No "censorship" of religion is involved in this case.

The school board does not control the curriculum or the teachers. It reserves the right, not yet exercised, to reject persons as instructors who do not have good character and good grammar. These are reasonable regulations of the use of school property committed to its care and involve no violation of religious freedom.

ARGUMENT.

I-A.

The Establishment of Religion Clause of the First Amendment Does Not Prevent the Free and Non-Discriminatory Use of Public Property for Religious Education Classes.

With respect to the clause of the First Amendment, "Congress shall pass no law respecting an establishment of religion", we contend for reasons already set forth that its meaning is not in issue here because it was not argued to or decided by the Supreme Court of Illinois. Without waiving that contention, our position is, first, that the clause does not prevent the *use of school buildings* for the holding of religious education classes *without preference to any sect* and, second, that if this clause of the First Amendment were to be interpreted so as to proscribe what was approved by both courts below, then such clause as so interpreted is not made applicable to the states by the Fourteenth Amendment.

The Origin and Meaning of The Establishment of Religion Clause of The First Amendment.

In order to determine the true meaning of the clause under discussion, it will be necessary to examine the history of the First Amendment. In doing so, it should be borne in mind that it is the meaning of the First Amendment which is being sought, not the meaning of James Madison's Remonstrance, or the meaning of the Virginia Bill for Establishing Religious Freedom, or the meaning

of Jefferson's phrase "wall of separation between church and state".

While in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, the actual decision of the Court was that the establishment of religion clause of the First Amendment did not prevent a state from paying the bus fares of parochial school students, the Court made in its opinion two related statements regarding the meaning of such clause which previous judicial decisions do not support and which the long history of the First Amendment disproves. These statements are that neither the Federal government nor a state can pass laws which "aid all religions", and that "no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion" (330 U.S. 1, 15, 16). Since the decision of the case was bottomed on the right of a state, as a matter of public welfare, to transport pupils to schools even though an incidental benefit was thereby conferred upon schools which teach some religious subjects, what was said regarding the establishment of religion clause proved unnecessary to the decision. Nevertheless, the two statements mentioned above are seized upon by the Appellant in support of this appeal, so that their correctness must be examined.

An examination of historical facts not brought to the attention of this Court in the *Everson* case will, we are confident, show that the establishment of religion clause of the First Amendment does not prevent use of state-owned property by its citizens in a way which may incidentally benefit all religion. We defer detailed comments on the *Everson* opinion until we discuss below the authorities which it cites.

However, references in the several *Everson* opinions to

Jefferson's "wall of separation between church and state" and the references to such doctrine in briefs filed herein as though it were in some undisclosed manner a basis for deciding this case, require a critical examination of this doctrine to determine to what extent, if at all, it either aids in or controls the decision of the present case.

The figure of speech, "wall of separation between Church and state" appeared in Thomas Jefferson's reply dated January 1, 1802* to an address to him from the Danbury Baptist Association. This reply was quoted and approved by this Court in *Reynolds* v. *United States*, 98 U.S. 145, 164 (1879) for the very limited purpose of showing that Federal legislation punishing polygamy in a territory was not a violation of the First Amendment.

Stating that the First Amendment had built a "wall of separation between Church and State", Jefferson obviously was referring only to the protection of religious opinion and rights of conscience from governmental interference, for he prefaced the now well-known figure of speech with the statement of the belief "that the legislative powers of the Government reach actions only, *and not opinions*" and followed the figure of speech by describing the religious clauses of the First Amendment as "this expression of the Supreme will of the Nation *in behalf of the rights of conscience*". (Italics supplied). In the *Reynolds* case the Court quoted Jefferson's reply, not because of its reference to separation of church and state, but as proof that the First Amendment protected religious *opinions* but did not protect immoral *acts* which Congress declared to be unlawful. The *Reynolds* case presented a situation wherein the phrase "separation between church and state" could not furnish a rule of judicial decision, for if the

*Jefferson, *Works* (1861), VIII, p. 113; Jefferson, *Writings* (1904), XVI, pp. 281-282.

phrase had been literally applied it would have prevented governmental interference with the defendant's practice of polygamy which he claimed was an expression of his religious belief.

The phrase "separation of church and state" is simply an attempt at an over-all short description of the general relationship of church and state in America as it actually exists and in all of its phases. The phrase is not the statement of an unfulfilled aspiration for which the nation is to strive. It is not a constitutional provision nor a law governing the relationship between church and state. It simply means that no official union of any church and any American state exists; that the corporate and official character of church and government are distinct, and, that as distinguished from a union of church and state, which exists where there is an established church, "separation of church and state" best describes the general relationship of church and state in America. However, the relationship of church and state, in the nation as a whole, necessarily involves and refers to the sum total of all relationships between them. It refers to all of the constitutions and laws of all of the states, and of the United States, as well as to the court decisions interpreting them, so far as they touch upon religion. It refers to their relationship in the different fields of law such as taxation, regulation by police power, and the formation and control of corporations. It refers to the customs and usages of the people in abjuring or encouraging participation in political action and debate by religious groups. It refers to the extent to which government protects, encourages or benefits religion and the extent to which religion does the same for government. It is no more and no less definitive and exact a phrase than are the equally heart-warming phrases, "the democratic way of life" or

"the American way of life". We are justly proud of all of these, but we do not attempt to decide litigated cases by the mere application of such rhetorical phrases. At best, slogans, rhetorical phrases, and labels are mere refuges from reason and authority*.

While we as a people subscribe to the general theory of separation of church and state, there are a multitude of ways in which religion and government touch, cooperate, depend one upon the other by reason of the intimate relationship between religion and society. This relationship reflects the basic fact that the individual man is at once a citizen and a believer subject both to government and to his conscience.

The decision of this case is obviously not to depend upon the application of such a generalized unincisive slogan as "separation of church and state" but upon the judicial interpretation of the First Amendment by application of recognized and established canons of construction. When this Court has thus interpreted the Amendment and has applied such Amendment to the facts of this case, the decision will become a part of the vast, heterogeneous field referred to by the phrase, "separation of church and state".

Likewise we respectfully suggest that a calm, judicial approach to the problem of ascertaining the meaning of the words of the First Amendment, here involved, will relegate Madison's "A Memorial and Remonstrance" to a position of little relative importance among the data available for construction of these words. A number of

* "The tyranny of labels must not lead us to leap to a conclusion that a word which in one set of facts may stand for oppression or enormity is of like effect in every other"—Mr. Justice Cardozo speaking for the Court in *Palko* v. *Connecticut*, 302 U.S. 319, 323 (1937).

patent considerations make this obvious. First, it was a pamphlet—generated in the heat of a legislative battle in Virginia—written five years before the First Amendment was drafted or proposed, and, of course, had no reference to it. Second, the document was directed, not against the equal aid and benefit of government for all religions, but rather was pointed specifically at the explicit establishment of one, namely the Christian. Third, it was written by a man whose views with reference to the meaning of the First Amendment are clearly and unequivocally set forth in the debate in Congress and these need no secondary reference for elucidation.

Any search of the Remonstrance for Madison's attitude toward church and state must be undertaken in the light of the evil against which it was directed. The Assessment Bill was one for the establishment of the Christian religion. This inequality Madison immediately saw, together with all of its implications. If the Christian religion could be established and preferred over all others, any other religion or the sect of any religion could, in its stead, be so established and preferred over all others. Accordingly it was this inequality of treatment of religions that was the very heart and core of Madison's opposition to the Bill.

If there is any validity to the Remonstrance as a means of interpreting the words "establishment of religion", it must be found in an examination of the language employed by Madison in order to understand better the usage and sense in which he employed the word "establishment". Examined for this purpose, it may indeed be valuable. The word "establishment" appears in it, not once, but eight times, and in every of these it is used clearly and explicitly to describe the exclusive monopolistic recognition and preferment by law of one religion over all others.

The search for the true meaning of the initial portion of the First Amendment and the application of it to the facts of this case, must be grounded upon two fundamental principles to which all will give assent:

First, constitutional provisions are either grants of power or restrictions upon power marking the extreme limits within which governmental power may be exercised and courts have nothing whatever to do with the wisdom or lack of wisdom of governmental action within those limits (*Booth* v. *Illinois,* 184 U.S. 425, 431 (1902)).

Second, the meaning to be sought is that expressed by the words used as they were commonly understood at the time they were written and in the light of the expressions of the framers during their legislative debates.* (*Ex Parte Bain,* 121 U.S. 1, 12 (1887); see also Mr. Justice Holmes, *Eisner* v. *Macomber,* 252 U.S. 189 (1920) at p. 220).

With these considerations ever in view let us refer to the background and environment of the language "Congress shall make no law respecting an establishment of religion".

At the time the Constitution was drafted, the possibility of formulating a constitution that would create a sufficiently strong federal government to perform its functions and at the same time meet with the approval of the States and the people, was widely doubted. There was widespread suspicion of governments in general and strong national ones in particular. It was this widespread feel-

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* The debates, of course, can not alter a plain meaning, for as Mr. Justice Frankfurter said (*Adamson* v. *California,* 332 U.S. 46, 64, 67 S. Ct. 1672, 1682, decided June 23, 1947):

> "Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech".

ing that led the framers to cast their work in the form of granted powers alone and it was as a corollary to this that the resulting document was completely silent upon the subject of religion except to forbid religious tests for office holders under the Constitution.

Religion was not mentioned, *first,* because it was intended that the Federal Government should have no control over the subject (Elliot's *Debates* (1836), III, 93, 204-205) just as the document made no mention of education or intrastate commerce for the same reason, and, *second,* because the religious beliefs and practices of the people throughout the states, as well as the extent of control exercised over religion by the States, were so diverse that it was wholly impractical to attempt any uniform system of relationship between religion and government. (Chas. Warren, *The Making of the Constitution* (1928), pp. 425-426; Story, *Commentaries on the Constitution,* (5th ed., 1891), I, p. 459, sec. 622; II, p. 633, sec. 1879).

This did not, however, indicate any disinterest in religion or indifference for its welfare, but rather spoke eloquently of the anxiety of the framers to protect it, foster it and pre-eminently, to leave it a local rather than a national matter. Most of the framers were devoutly religious and all professed a religious interest *, consistent with the time which was one of great strength of religious forces with active competition among different religious denominations (Story, *Commentaries,* (5th ed., 1891), II, p. 631, sec. 1877; II, p. 634, sec. 1879). To say that interpretation of the Constitution and its amendment is to be made in the light

*"Every one of its members was a believer in God, and in future reward and punishment, and most of them, including the presiding officer, Washington, were church members"—Edwin C. Goddard, "The Law in Its Relation to Religion", 10 Mich. L. Rev. 161, 166.

of these facts or as it is expressed in the *Trinity Church* case (*Church of the Holy Trinity* v. *United States,* 143 U.S. 457, 465, 470 (1892)) in the light of the fact that "* * * no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people" is therefore not a mere appeal to sentiment or a play upon words, but is a meaningful and fundamental aid to construction.

When the great document was referred to the States for adoption or rejection, heated debates took place in the several State Conventions by which it was considered. These largely centered about the dangers inherent in setting up a government much more powerful than any of the parts and the consequent need strictly to limit its powers over the individual and to guarantee a division of powers between the State and Federal Governments. Consequently, opponents of the Constitution contended for, and its friends promised, amendments to it which would clearly deny Federal power in certain fields thereby guaranteeing to the people certain fundamental rights, commonly referred to as the "Rights of Man", and thereby reserving to the states power over certain other rights, such, for example of the right to maintain the militia. (Jefferson, *Writings* (1904 ed.) XIX, p. 57, letter March 23, 1789 to John Paul Jones.)

The ratifying conventions request amendments.

Amendments to be proposed for consideration by the first Congress were considered by most of the ratifying conventions. Several of these conventions accompanied ratification with a request for specific amendments or with resolutions setting forth declarations of principle which are relevant here. Other amendments were proposed by minorities and were defeated in convention and so were

not transmitted to Congress. These declarations and proposed amendments, so far as they related to religion, were as follows:

Pennsylvania (ratified December 12, 1787): An amendment proposed to the Pennsylvania convention but not adopted (E. F. Humphrey, *Nationalism and Religion in America*, 1924, p. 461):

> The right of conscience should be held inviolable and neither the legislature, executive or judicial powers of the United States shall have the power to alter, abrogate or infringe any part of the constitutions of the several states which provide for the preservation of liberty in matters of religion.

Maryland (ratified April 28, 1788). Amendment proposed to the Maryland Convention but not adopted (Elliot's *Debates* (1836) II, p. 553):

> 12. That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty.

South Carolina (ratified May 23, 1788). Amendment requested (Elliot's *Debates* (1836), I, p. 325):

> That the Third Section of the Sixth Article ought to be amended, by inserting the word "other" between the words "no" and "religious".

New Hampshire (ratified June 21, 1788). Amendment requested (Elliot's *Debates* (1836), I, p. 326):

> Congress shall make no laws touching religion, or to infringe the rights of conscience.

Virginia (ratified June 26, 1888). The ratifying resolution of the Virginia Convention declared, in part, "that, among other essential rights, the liberty of conscience, and of the press, cannot be cancelled, abridged, restrained, or modified by any authority of the United States" (Elliot's

Debates (1836), I, p. 327). A proposed "declaration or bill of rights" recommended as an amendment to the Constitution was adopted the next day, June 27, 1788, and included (Elliot's *Debates* (1836), III, p. 659):

> 20th. That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.

New York (ratified July 26, 1788). The New York Convention proposed amendments but none relating to religion. Its resolution ratifying the Constitution declared (Elliot's *Debates* (1836), I, p. 328):

> That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others.

North Carolina (ratified November 21, 1789, Elliot's *Debates* (1836), I, p. 333). The first convention neither ratified nor rejected the Constitution but on August 1, 1788, shortly before its adjournment, passed a declaration of rights containing a twentieth clause which was identical in form with that proposed by Virginia (Elliot's *Debates* (1836), IV, pp. 244, 251).

Rhode Island (ratified May 29, 1790). It proposed amendments but none on the subject of religion. The resolution of ratification did "declare and make known" certain principles, "declaring that the rights aforesaid cannot be abridged or violated, and that the explanations aforesaid are consistent with the said Constitution". Clause IV of this declaration was, with minor textual variations, the

same as the 20th clause of the Virginia declaration (Elliot's *Debates* (1836), I, p. 334).

In determining the meaning of the words in the First Amendment, "any law respecting an establishment of religion", it is important to observe the text of the above amendments and declarations on the specific subject of an establishment of religion—distinguishing that subject from freedom of conscience and of religious worship.

Virginia did not request the enactment of an amendment having the language of her Bill for Establishing Religious Freedom (12 Hening, Va. Stats., p. 86) but so far as material here proposed only "that no particular religious sect or society ought to be favored or established, by law, in preference to others".

North Carolina requested an amendment in identical language.

Except that it omitted the word "particular", New York's declaration of principles was identical with the above language of Virginia.

Rhode Island, after the First Amendment had already been formulated and submitted to the states, used language identical with the language of Virginia.

The proposal for an amendment rejected by the Maryland convention was "that there be no national religion established by law."

All of the above showed simply a desire that no religious sect or society be favored or established by law in preference to others. No prohibition of equal aid to all religions is suggested by the language.

Only New Hampshire asked for a broader prohibition. At this time, the New Hampshire constitution, adopted in 1784, required its chief executive, and its state senators and representatives to be of the Protestant religion

(Thorpe, *Constitutions* (1909) IV, pp. 2459 *et seq.*) and also expressly authorized New Hampshire towns "to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" (Thorpe, *Constitutions* (1909), IV, p. 2454). The New Hampshire ratifying convention asked for this amendment (Elliot's *Debates*, (1836), I, p. 326):

> Congress shall make no laws touching religion, or to infringe the rights of conscience.

The purpose of the New Hampshire amendment was obviously not to guarantee to the individual any greater freedom from taxation for the benefit of religion than the amendments of the other states intended or than New Hampshire provided by its own Constitution; the proposed amendment was no doubt designed to furnish an absolute certainty that Congress would not interfere with the existing establishment in that and other states.

In determining the meaning of the words finally adopted, great reliance may safely be placed on the amendments proposed by the states, because it was to satisfy the demands of the states that the bill-of-rights amendments were proposed by James Madison of Virginia.

Madison's attitude toward a bill of rights.

Emphatically, Madison was not on any crusade of his own. It was not he, but others, who feared the absence of a bill of rights. Madison wrote Thomas Jefferson on October 17, 1788, about the growing demand for a bill of rights, saying in part:

> "My own opinion has always been in favor of a bill of rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect, nor been anxious to sup-

> ply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and, if properly executed, could not be of disservice". (Madison, *Writings* (1865), I, p. 423.)

In this same letter Madison expressed his fear "that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude", mentioning specifically "the rights of conscience".

That Madison was impelled by a duty owed to his constituents, rather than by any personal anxiety for amendments, may be inferred from his remarks in introducing the subject on June 8, 1789 (Annals of Congress, I, p. 424):

> "This day, Mr. Speaker, is the day assigned for taking into consideration the subject of amendments to the Constitution. As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted or rejected by a Constitutional majority of this House."

During the Congressional debates, some of which are set forth below, Madison made further remarks evidencing a lack of personal concern whether amendments were adopted.

Additional and conclusive evidence that it was the request of the states for amendments which induced Congress to propose amendments at the first session is contained in the preamble to the joint resolution submitting the twelve articles of amendment—the third of which became the First Amendment. This preamble was (1 U.S. Stat. L. 97):

> The conventions of a number of states having at the time of their adopting the Constitution expressed a desire, in order to prevent misconstruction or abuse

> of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government will best insure the beneficent ends of its institution—RESOLVED * * *

For the above reasons, the language of the amendments proposed by the several states, which clearly were directed only against the preferment *by law* of one religion over another, militates against the argument that the First Amendment was designed or intended to prevent the Federal government (and least of all the state governments) from allowing public property to be *used* equally and without discrimination for religious purposes.

Madison's Amendments Regarding Religion.

Madison accepted the responsibility for the preparation and introduction of amendments and for their speedy consideration. On June 8, 1789, with the prefatory remarks already set out, he introduced his draft of amendments (Annals of Congress, I, pp. 433-436) none of which was in a form requested by any of the States, but all of which were designed to include and meet the states' most insistent objections to the original Constitution. He stated (Annals, I, p. 433):

> "The amendments which have occurred to me proper to be recommended by Congress to the State Legislatures, are these:"

Version No. 1: "nor shall any national religion be established".

And the fourth of them so far as the same related to the subject of religion was (Annals, I, p. 434):

> Fourthly, that in Article 1st, section 9, between clauses 3 and 4, be inserted these clauses, to wit: The civil rights of none shall be abridged on account of

> religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed * * *

The Fifth of these read (Annals, I, p. 435):

> That in Article 1st, section 10, between clauses 1 and 2, be inserted this clause, to wit: No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

The first of these, designated "Fourthly", was an amendment to a section of the original Constitution which was a limitation alone upon Congress. It set forth the Bill of Rights which Madison deemed to be proper to restrict the power of the Federal Government in matters of religion. The second of these, designated "Fifthly", was to be inserted among the provisions already prohibiting States from enacting ex post facto laws, impairing the obligations of contracts, etc., and was a limitation solely upon the States.

On June 8, 1789 (Annals, I, p. 450) this draft was referred to the Committee of the Whole and on July 21st, upon the matter being again brought to the attention of the House by Mr. Madison (Annals, I, p. 660), the amendments were referred to a committee of eleven members, one from each state, Virginia being represented thereon by Mr. Madison.

Version No. 2: "no religion shall be established by law."

On August 15, sitting as a Committee of the Whole, the House began consideration of the fourth proposition of the amendments reported by the Committee of Eleven, which read (Annals, I, p. 729):

> Article 1, Section 9: Between paragraphs two and three insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed".

Debates on Version No. 2.

The Annals of Congress are unusually complete in their report of the debate which ensued thereon and preserve the comments of eight members of the House. So important is the legislative history of the amendment, thus disclosed, that it will be illuminating to set out the entire debate* (Annals, I, pp. 729-731):

"Mr. Sylvester had some doubts of the propriety of the mode of expression used in this paragraph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

"Mr. Vining suggested the propriety of transposing the two members of the sentence.

"Mr. Gerry said it would read better if it was, that no religious doctrine shall be established by law.

"Mr. Sherman thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments; he would, therefore, move to have it struck out.

"Mr. Carroll.—As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present Constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

"Mr. Madison said, he apprehended the meaning of

*cf. *Carpenter* v. *Pennsylvania*, 17 How. 456, 463, (1854) and see Annotation, "Debates, Etc. As Aids to Construction", 70 A.L.R. 26.

the words to be, *that Congress should not establish a religion, and enforce the legal observation of it by law,* nor compel men to worship God in any manner contrary to their conscience. *Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions,* who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and *establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit* [Italics supplied].

"Mr. Huntington said that he feared, with the gentleman first up on this subject; that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting-houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment.

"By charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all.

"Mr. Madison thought, if the word 'National' was inserted before religion, it would satisfy the minds

of honorable gentlemen. *He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent.* [Italics supplied.]

[*Version No. 3: "shall make no laws touching religion."*]

"Mr. Livermore was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it were altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing the rights of conscience.

"Mr. Gerry did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present Constitution. It had been insisted upon by those who were called anti-federalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called anti-federalists at that time, complained that they had injustice done them by the title, because they were in favor of a Federal Government and the others were in favor of a national one; the federalists were for ratifying the Constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and anti-federalists, but but rats and anti-rats.

"Mr. Madison withdrew his motion, but observed that the words no national religion shall be established by law, did not imply that the Government was a national one; the question was then taken on Mr. Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it."

Except for the political inexpediency of using the term "national", the words used in the amendment would have

been Madison's "no *national* religion shall be established by law", in which case surely no one would suggest that the amendment was designed to prohibit anything other than the erection of a national church or religion with consequent preferment over other religions.

In the face of the representations—the most significant of which we have italicized above—on the part of Mr. Madison, it is little short of remarkable that any one can ascribe to Mr. Madison an intention that the First Amendment should be given a different meaning than he himself assigned to it in such debate. Are we to brush aside the indisputable historical fact that when questioned by his legislative colleagues, Madison said he apprehended "the meaning of its words to be: that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience"?

Are we now, 160 years after the amendment was explained by Madison, to examine his writings and speeches outside of the legislative chamber and from them seek to determine what his own personal political philosophy was as to the relationship of Church and State and then, disregarding his words at the time of the framing of the amendment, ascribe to the amendment the meaning thus gleaned?

The plain fact is that whatever Mr. Madison's personal political or philosophical views were about the undesirability of conferring the benefits and aid of government upon religion or religious education, he did not as a legislator attempt to write into the amendment any prohibition against equal government aid to all religions.

If he would have personally liked to, he nevertheless as a legislator did not attempt it, doubtless for the good rea-

son stated by him in discussing another amendment (Annals, I, p. 738):

> "I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system".

Version No. 4: "shall make no law establishing religion."

On August 20, 1789, (Annals, I, p. 766) the House resumed consideration of the amendments and on motion of Mr. Ames (Annals, I, p. 766) the fourth amendment, as the religious guarantee was then numbered, was altered so as to read:

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

This was done without recorded discussion or debate and was obviously a mere alteration in form without change in content or meaning from the original form which the amendment took in the report of the committee of eleven. The resulting change from the Livermore amendment restored almost the exact language to which Mr. Madison in the debate set out above ascribed the meaning "that Congress should not establish a religion, and enforce the legal observation of it by law" (Annals, I, p. 730) and which Madison had said could express its meaning even more clearly by the insertion of the word "national" before the word "religion". Mr. Livermore's tentative amendment previously adopted by the Committee of the whole was thus entirely disposed of and so far as relevant to our discussion the committee version was reinstated.

The Annals of Congress do not indicate any change in the House text of August 20, 1789, set forth above but apparently a change in the concluding words ("or to in-

fringe the rights of conscience") which is not material here was authorized when the amendments were adopted in the House on August 24, for the Senate Journal of August 25, shows the then third amendment in the following language:

> Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.*

No record was made of the senate debates discussing this amendment and no light has been thrown thereon by examination of the private papers of the Senators or of current newspapers and magazines. The lack of any such account of debate regarding the third amendment (now the First) is, however, itself significant in its implication that no heated contest developed regarding content and that form was the chief consideration involved in the change made by the Senate. The short period of time that the House proposal was before the Senate leads to the same conclusion. The Amendment was first considered by the Senate on August 25 (Annals, I, p. 71) and the Senate on September 9, (Annals, I, p. 77) amended it to read as follows (Records of U. S. Senate, September 9, 1789, U. S. National Archives):

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*Thorpe, *Constitutional History of the United States* (1901), p. 259; verified from senate document dated August 25, 1789 in the U. S. National Archives. The above House version as received by the Senate is set forth in note 6 to Mr. Justice Reed's opinion in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) at page 124, and appears in the photograph of the seventeen amendments received by the Senate on August 25, 1789, THIRD ANNUAL REPORT, Archivist of the U.S., 1936-1937, p. 64.

[*Version No. 5: "no law establishing articles of faith or a mode of worship".*]

> Congress shall make no law establishing articles of faith or a mode of worship or prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble, and to petition to the government for a redress of grievances.

This did nothing to the House version but indicate the Senate's desire that the amendment contain nothing antagonistic to religion and to make clear that the amendment meant that Congress should not establish a national religion and enforce observance of it by law. This was simply the Senate's way of expressing the meaning which the House intended, as shown by the debates in the House.

Amending the words "establishing religion" to read "establishing articles of faith or a mode of worship" indicated that the Senate entertained the same fear expressed by Messrs. Sylvester and Huntington in the House debate above, namely, that the House wording "Congress shall make no law establishing religion" might be interpreted as hostile to religion. To eliminate this possible implication of hostility to religion and at the same time preserve the meaning intended by the House, language was adopted very similar to that proposed by Elbridge Gerry of Massachusetts in the House when he had said, as set forth in the debate above, that "It would read better if it was, that no religious doctrine shall be established by law." (Annals, I, p. 730, quoted above, p. 40.)

Final Version: "no law respecting an establishment of religion".

Subsequently a committee of conference was appointed and thereafter within 15 days after the Senate revision, the committee had agreed on the language now found in the First Amendment:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *,

and the House had on September 24, without discussion or debate, approved the conference committee's language (Annals, I, p. 913). The Senate approved this final version on September 25, 1789 (Annals, I, 88). Again it is obvious that it was not considered that the form in which it emerged from the conference committee had materially changed the intrinsic meaning.

So far as relevant here, the House version "Congress shall make no law establishing religion", and the Senate version "Congress shall make no law establishing articles of faith or a mode of worship" had been changed to read:

> Congress shall make no law respecting an establishment of religion.

The word "establishing" thus became "establishment". The easiest road to compromise of the divergent language of the House and Senate versions had been the one of minimal change—the word "establishing" which was subject to the possibility of too drastic a meaning gave way to the noun "establishment", and the word "religion" could then safely be restored. The phrase chosen—"establishment of religion"—everyone understood, from the constitutional lawyer to the man on the street, as meaning a state or national church or religion resulting from the preferment by law of one sect or religion above all others.

Undoubtedly the shift from "Congress shall make no law establishing religion" in the House version to "Congress shall make no law respecting an establishment of religion" was intended, by the use of the specialized word "establishment", to make it clear that it was "an *establishment* of religion"—not *religion* itself—respecting which Congress was expressly prohibited from legislating. The use of the language finally adopted makes inadmissible any interpretation which disregards the words "establishment of" and which treats the amendment as though it read "Congress shall make no law respecting religion". (See *Knowlton* v. *Moore*, 178 U.S. 41 (1900) where the Court, p. 87, refers to "the elementary canon which requires that effect be given to each word of the Constitution".)

Having changed the word "establishing" to the noun "establishment", a simple grammatical problem remained to be solved. Some word was necessary to connect the phrase ending with "law" to the remainder, "establishment of religion". The preposition "respecting" lay readily at hand. It was already in numerous laws of the states and was common in legal usage and statutory phraseology. It was accordingly inserted, apparently both to solve the grammatical problem and to make it clear that the Federal government should neither *establish* a national religion nor *disestablish* state religions then in existence. There thus emerged a compromise in language which preserved intact the meaning which Madison—as a legislator interpreting the purpose of the states in submitting their amendments—had so clearly ascribed to the House version in debate on the floor of Congress and the meaning which the Senate had so clearly expressed in its own version. At the same time there was eliminated all implication of hostility toward religion to which the words of the House, "Congress shall make no law establishing religion" were subject.

The resulting amendment doubtless did not fully express Madison's philosophy regarding state aid to religion but as a practical statesman faced with compromising between what he personally wanted and what others wanted, he took what the political climate would permit.*

Madison could not have been oblivious to the fact that public opinion would have been shocked at the thought that equal, non-preferential aid and benefits of government

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*Explaining his attitude toward the controversy regarding a Bill of Rights being added to the Constitution, Madison had said in a letter to Jefferson dated October 17, 1788 (Madison, *Writings*, I, pp. 423-425):

> "I have not viewed it in an important light—1. Because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. *Because there is some great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power.* One of the objections in New England was, that the Constitution, by prohibiting religious tests, opened a door for Jews, Turks, and infidels. 3. Because the limited powers of the federal Government, and the jealousy of the subordinate Governments, afford a security which has not existed in the case of the State Governments and exists in no other. 4. Because experience proves the inefficacy of a bill of rights on those occasions when its control is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State." (Italics supplied).

Similarly, Madison recognized in Congress, upon the occasion of his introduction of his amendments, that the amendments were not necessarily what he himself most desired but were what could "meet the concurrence required by the Constitution." (Annals of Congress, I, p. 433.)

should not be extended to religion (Story, *Commentaries on the Constitution,* (5th ed. 1891), II, sec. 1874).

Virginia Finds the First Amendment Wanting.

Any argument that the establishment of religion clause of the First Amendment incorporated a prohibition against all financial aid to religion, claimed to be inherent in the Virginia Bill for Establishing Religious Freedom, is inconsistent with the sharp and immediate opposition to the First Amendment in the Virginia Assembly, particularly the Virginia senate. It is indeed strange, if the First Amendment (then the Third Article of Amendment) did incorporate all of Virginia's ideas in favor of religious freedom and against any financial support of religious worship, that the amendment there met opposition so effective as to postpone entirely its ratification until December 30, 1791 (Annals of Congress, III, p. 54) by which time the first Ten Amendments had been ratified by sufficient of the other states to make them binding on Virginia. We believe that this Court's attention has not previously been called to the important and indisputable evidence of the unfriendly reception accorded the Amendment by the Virginia Assembly.

On September 28, 1789, three days after concurrence by the Federal Senate and House on the twelve proposed amendments, Richard Henry Lee and William Grayson, United States senators from Virginia, wrote the Governor of that state transmitting the twelve amendments, and saying in part that "it is with grief that we now send forward propositions inadequate to the purpose of real substantial amendments, and so far short of the wishes of our Country [state]". (From *The Daily Advertiser,* New York, N.Y., Jan. 2, 1790).

On the same day, the same Virginia senators wrote a

letter to the speaker of the Virginia House of Representatives, "enclosing the proposition of Amendments to the Constitution of the United States that has been finally agreed upon by Congress" and continuing in part (*The Daily Advertiser,* New York, N.Y., Jan. 2, 1790):

> "We can assure you Sir, that nothing on our part has been omitted to procure the success of those radical amendments proposed by the Convention, and approved by the Legislature of our Country [state], which as our constituent, we shall always deem it our duty with respect and reverence to obey. The Journal of the Senate herewith transmitted, will at once show how exact and unfortunate we have been in this business". [Punctuation as in *The Daily Advertiser.*]

That the United States Senators from Virginia were expressing a dissatisfaction with the amendments which was current in Virginia seems clear, for the state senate postponed approval of the third article [First Amendment] and prevented its early ratification (Madison, *Writings* (1865), I, p. 501).

The Virginia Senate's Objections to the First Amendment.

On December 12, 1789, eight members of the Virginia senate, who were in the majority which had postponed until the next session of the Assembly the third, eighth, eleventh, and twelfth articles of amendment recommended by Congress, entered on the journals "the considerations which have influenced our decision on this subject and our principal objections to these articles." (Journal of Virginia Senate, 1789 (Thos. White, Richmond, 1828), pp. 61-64, also in *The Daily Advertiser,* New York, N. Y., Jan. 26, 1790, reprinting Journal of the Senate, Dec. 12, 1789 from *The Virginia Independence Chronicle*).

In part they stated:

> The Senate of Virginia, having determined to postpone until the next session of Assembly, the third,

eighth, eleventh and twelfth articles to the constitution of the United States recommended by Congress: We the under-written members of the majority on that question, deem it incumbent on us not only from the respect we owe to our constituents and our responsibility to them, but in order to prevent doubt or misrepresentation, to enter on the journals of the house the considerations which have influenced our decision on this subject and our principal objections to those articles.

We are satisfied that the people of Virginia would never have ratified the constitution of the United States, but from a confident hope and firm persuasion of speedily seeing it much more materially altered and amended than it would be by ratifying the propositions lately submitted by Congress to state legislatures. That although we consider some of the amendments offered, as similar, and others merely equivalent to a part of the amendments proposed by Virginia and other states, yet some of them which may seem analogous to other amendments so proposed, are not substantially the same, and fall far short of affording the same security to personal rights, or of so effectually guarding against the apprehended mischief of the government. Of this description we consider the third, eighth, eleventh and twelfth articles.

We conceive that the third article which seems given in lieu of the fifteenth, sixteenth, nineteenth and twentieth articles of the Bill of Rights proposed by the Virginia convention, will not bear a comparison with those articles.

The fifteenth expressly declares the right of the people to assemble together to consult for the common good, to instruct their representatives and to petition for redress of grievances. The sixteenth asserts the right of the people to freedom of speech and of writing and publishing their sentiments and secures the liberty of the press. The nineteenth and twentieth, hold sacred the right of conscience, secures to every religious sect or society, the most perfect equality and effectually guards against any religious establishments.

The third amendment recommended by Congress

does not prohibit the rights of conscience from being violated or infringed; *and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over the others, and in the process of time render it powerful and dangerous as if it was established as the national religion of the country.* (Italics supplied).

* * * * *

This amendment then, when considered as it relates of any of the rights it is pretended to secure, will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the amendment proposed by Virginia, and other states for the protection of these rights. We conceive that this amendment is dangerous and fallacious, as it tends to lull the apprehensions of the people on these important points; without affording them security, and mischievous because by setting bounds to Congress it will be considered as the only restriction on their power over these rights, and thus certain powers in the Government which it has been denied to possess, will be recognized without being properly guarded against abuse.

* * * * *

We consider that of the many and important amendments recommended by the conventions of Virginia and other states, these propositions contain all that Congress are disposed to grant, that all the rest are by them deemed improper, and that they are offered in full satisfaction of the whole, and although the ratification of a part of the amendments that have been prayed for by Virginia, would not absolutely preclude us from urging others, yet we conceive that by the acceptance of particular articles we are concluded as to the points they relate to. Considering therefore that, they are far short of what the people of Virginia wish and have asked, and deeming them by no means sufficient to secure the rights of the people or to render the Government safe and dis-

tinguishable we think our countrymen ought not to be put with amendments so inadequate.

That being satisfied of the dangerous effects and tendency of these four articles of the proposed amendments, we are constrained to withhold our assent to them but unwilling for the present to determine on their rejection; we think it our duty to postpone them until the next session of assembly in order that the people of Virginia may have an opportunity to consider of them and know the sentiments of their constituents on the subject.

The above document is highly significant because it so well demonstrates that Virginians, who, after all, were the ones most familiar with the Virginia concept of religious freedom, did not interpret the First Amendment as living up to the spirit or the letter of the Virginia Bill for Establishing Religious Freedom. Since there is no evidence that the Memorial and Remonstrance or the Virginia Bill did enter into the Congressional deliberations on the First Amendment, but there is every evidence that the amendments proposed by the several states were considered, it is only natural that the amendment which was proposed for ratification reflected the attitude of all of the states—a national attitude, not merely the local attitude of Virginia.

The Common Meaning of "Establishment of Religion".

We now turn to an examination of literary and historical sources contemporaneous with the use of the words "respecting an establishment of religion" in the First Amendment. This seems necessary because the meaning ascribed to the phrase by the appellant and lent support by dicta in the *Everson* case, is altogether broader than is warranted by any recognized canon of construction. That it meant simply "national or state church" to the

framers has been shown by its legislative history and background already set forth. Its meaning in common usage is of even greater significance for it is the common and ordinary meaning of the words employed which is the first great canon of construction. Here too there is a uniform and unbroken stream of illustrations which demonstrate that everyone—voters and framers alike—knew at the time of the adoption of the amendment that the words "establishment of religion" meant a state or national church or religion established by law and receiving preferences from government, not equally enjoyed by others, including most commonly tax support for its clergy and houses of worship.

"Establishment" in existing State Constitutions.

The most obvious source available for examination in searching out the common meaning ascribed to this phrase—establishment of religion—is the state constitutions in force at the time of the framing and adoption of the First Amendment. Seven of them had provisions of great similarity in which the words "establish", "established", or "establishment" were used. In each of these, the words were coupled with other language which clearly indicated that the prohibition was directed solely and wholly at preferential or discriminatory treatment of religion, not at all at equal aid to or benefit of religion generally.*

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*Dates refer to the respective dates of the state constitutions. Source is Thorpe, *American Charters, Constitutions and Organic Laws* (1909):

Delaware (1776)—Art. 29: "There shall be no establishment of any one religious sect in this State in preference to another;" (Thorpe, I, p. 567).

Massachusetts (1780)—Part First, Art. 3: "* * * * and no subordination of any one sect or denomination to

The importance of these constitutional provisions is hardly susceptible of over-emphasis for not only do they verify the understanding of the words common at that time, but along with other American Constitutions they were naturally looked to as precedents for the Federal Bill of Rights and the language of the First Amendment may be safely supposed to have been modeled on them and used in a like sense.

The meaning of "Establishment of Religion" in Everyday Usage.

In 1789, the word "establishment" was pregnant with the controversy that had raged and was still raging with

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another shall ever be established by law." (Thorpe, III, p. 1890)

New Hampshire (1784)—Art. 6: "And every denomination of christians demeaning themselves quietly, and as good subjects of the state, shall be equally under the protection of the law, and no subordination of any one sect or denomination to another, shall ever be established by law." (Thorpe, IV, p. 2454).

New Jersey (1776)—Art. 19: "That there shall be no establishment of any one religious sect in this Province, in preference to another; * * *". (Thorpe, V, p. 2597).

New York (1777)—Article 35 abrogated all laws, common or statutory, which "might be construed to establish or maintain any particular denomination of Christians or their ministers". (Thorpe, V, p. 2636).

North Carolina (1776)—Art. 34: "There shall be no establishment of any one religious church or denomination in this State, in preference to any other; * * *" (Thorpe, V, p. 2793).

South Carolina (1778)—Art. 38: "That all persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments and that God is publicly to be worshipped, shall be freely tolerated. The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State". (Thorpe, VI, p. 3255).

reference to the disestablishment of the Church of England. Every school boy has learned that the longest word in the English language is "anti-disestablishmentarianism". All of the derivatives and root words of "establish" were in usage in connection with this controversy, including *establish, establishment, establishmentarian* and *establishmentarianism.* Similarly, *disestablish, disestablishment,* and their derivatives were used. All of these words referred to this controversy and particularly the word "establishment" when used in association with "religion" referred to the legal status of an established church in relation to the State.

That there has been no change in meaning or usage which can justify any different definition than the historical one will quickly appear from any authoritative current dictionary or encyclopedia. We will quote but two. Webster's *New International Dictionary,* (2d. ed., Unabr.), gives the following meaning of "establishment":

> "esp: a. the establishing by law of a church or religion".

It is significant also that the current edition of the Encyclopedia Britannica in its article on the word "establishment" (vol. 8, p. 726) states in part as follows:

> "ESTABLISHMENT, a word applied to certain religious bodies in their relation to the State. Perhaps the best definition which can be given and which will cover all cases, is that establishment implies the existence of some definite and distinctive relation between the State and a religious society (or conceivably more than one) other than that which is shared in by other societies of the same general character. It denotes any special connection with the State, or privileges and responsibilities before the law, possessed by one religious society to the exclusion of others; in a word, establishment is of the nature of a monopoly."

That the word "establishment" had the same meaning at the time of the adoption of the Amendment as is set forth above will be made clear by references to dictionaries setting forth the definitions of words of historical significance, at different periods. Thus, Murray, *A New Dictionary of Historical Principles* (1888-1933), vol. 3, defines "establishment" as follows:

> "2. esp. the 'establishing' by law (church, religion, form of worship) (a) in early use the settling or ordering in a particular manner, the regulating and upholding of the constitutions and ordinances of the church recognized by the state (b) in 17-18 c. occasionally the granting of legal status to (other religious bodies than that connected with the state) (c) now usually, the conferring on a particular religious body the position of a State church".

This dictionary in its text gives examples of usage from writings current at different dates, including under the year 1788 the following:

> "Priestly lect. his. V LVII 'there is no place where there are more forms of religion openly professed and without the establishment of any of them, than Pennsylvania'."

Likewise, in the *Century Dictionary and Encyclopedia*, the term, "establishment," is defined as follows:

> "6. The authoritative recognition by a State of a Church, or a branch of a church as the national church; the legal position of such a church in relation to the State, hence, also, the religious body thus recognized by the State, and intended and more or less supported as the State church; especially of the Church of England and the Church of Scotland."

In the same dictionary, "establishmentarian" is defined as follows:

> "2. Upholder of the doctrine of recognition of a church by the State and its maintenance by law",

and "establishmentarianism" is defined as meaning:

> "The doctrine or principle of establishment in religion; support of an established church".

A few references from scattered sources in the literature and newspapers of the time, as well as from the debates in only one of the State Conventions called to ratify the Constitution, the convention of North Carolina, will suffice to show that this particular meaning was universally ascribed to the word.*

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* *The American Museum or Repository of Ancient and Modern Fugitive Pieces, Prose and Poetical,* under the heading "Remarks on the Proposed Amendments to the Federal Constitution", September, 1789, No. 111, Volume VI, Total No. XXXIII; pages 235-236:

"It would be very unjust and pernicious to establish any religious system in the United States; but it is needless to guard against such a visionary evil. * * *

"The convention of South Carolina would amend the 3d sect. of the 6th article by inserting the word 'other' between the words 'no' and 'religious'.

"This section, after requiring of all concerned, an oath or affirmation to support the constitution, adds, 'but no religious test shall ever be required as a qualification to any office or public trust under the United States'. If this amendment points out a mere inaccuracy of style, it is so far proper—an oath or affirmation being a religious test; if it means to guard against religious establishments, it is, by what has been said, superfluous."

The Federal Gazette, June 18, 1789:

"The next article [First Amendment] establishes religious liberty, and all of those political rights, which by various tricks of state have been wounded through its means, on the firmest grounds. The tender, the almost sacred rights of conscience, say this inestimable article, shall by no means, on no account be abridged or interfered with. No self righteous or powerful church shall set up its impious domination over all of the rest. Every pious man may pay to the Divine Author of his existence

Practical Construction by Congress of Establishment of Religion Clause.

The true meaning of the First Amendment may logically next be sought in an examination of the contemporaneous acts of the Congress which framed it .** Appellant's position that the amendment prohibits any law respecting

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the tribute of thanksgiving and adoration in the manner of his fore-fathers. (S) A Pennsylvanian".

The Independent Gazetter or The Chronicle of Freedom, November 28, 1787:

"I hope and trust that there are few persons at present hardy enough to entertain thoughts of creating any religious establishment for this country; although I have lately read a piece in the newspaper which speaks of religious as well as civil and military offices, as being hereafter to be disposed of by the new government; but if a majority of the continental legislature should at any time think fit to establish a form of religion for the good people of this continent, with all the pains and penalties which in other countries are annexed to the establishment of a national church; what is there in the proposed constitution to prevent their doing so? Nothing for we have no bill of rights. (S) An Old Whig."

Debates in the North Carolina Convention (1788):

Mr. Henry Abbot: "Many wish to know what religion shall be established. I believe a majority of the community are Presbyterians. I am, for my part, against any exclusive establishment; but if there were any, I would prefer the Episcopal" (Elliot's *Debates*, IV, p. 192).

Mr. James Iredell: "They certainly have no authority to interfere in the establishment of any religion whatsoever; and I am astonished that any gentlemen should conceive they have." (Elliot's *Debates*, IV, p. 194).

Mr. Samuel Spencer: "He therefore thought that no one particular religion should be established." (Elliot's *Debates*, IV, p. 200).

** *Ames* v. *Kansas*, 111 U.S. 449, (1884); *Knowlton* v. *Moore*, 178 U.S. 41, 92-93 (1900); *Van Dyke* v. *Gerry*, 244 U.S. 39, 46; *State* v. *Peterson*, 159 Minn. 269, 198 N.W. 1011, 1012.

religion, even though it equally benefits all religion, is inconsistent with the legislative acts of the First Congress which repeatedly recognized and impartially aided and benefited religion.

Thus on the very day (September 24, 1789) that the House accepted the report of the Conference Committee and adopted its resolution recommending the First Amendment and the others to the States, it also adopted a resolution (Annals of Congress, I, pp. 914-915) "That a joint committee of both Houses be directed to wait upon the President of the United States, to request that he would recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness."

Again, on January 7, 1790, the House adopted a resolution (Annals I, p. 932) "that the chaplains, of different denominations, be appointed to Congress for the present session, one of each House, who shall interchange weekly." This was implemented on the following day (January 8, 1790) by the election of the Rev. William Linn to the office (Annals, I, p. 1043). This practice of electing a Chaplain as an officer of each House and paying him a salary from the national treasury was continued in the Second Congress and without deviation to the present time. During all of this period Congress has been regularly convened by prayer and not simply religious education, but religious worship, of an undenominational character, has been regularly paid for at national expense and joined in by the national legislature.

Similar action with reference to religion was taken by the adjournment of the House on April 2, 1790, in observance of Good Friday (Annals II, p. 1519).

On March 3, 1791 the Congress passed an act for the raising of another regiment of troops and provided for the appointment among other officers of a chaplain (1 U. S. Stat. L. 223).

The Second Congress on March 5, 1792 similarly provided for chaplains in the Army (1 U. S. Stat. L. 241) and the Third Congress made similar provision for the Navy on March 27, 1794 (1 U. S. Stat. L. 350). Again this recognition and benefit of religion has been regularly extended and multiplied by every Congress; not excepting the one now sitting.

This contemporaneous interpretation by the Congress attributed no meaning of quarantine to the "establishment of religion" clause but treated it only as equalizing all religions before the law.

Practical Construction by the Executive.

In the executive department of government a similar treatment was accorded religion. President Washington inaugurated the practice of proclaiming days of prayer and thanksgiving and with the exception of Thomas Jefferson, no President has omitted this recognition of religion.

These practices have not been followed in disregard of the Constitution or out of any unawareness of its provisions, but on the contrary have been adopted as a settled part of our processes of government in the face of determined opposition by Deists and atheists. Their objections have been repeatedly considered and overruled upon thoughtful consideration of the First Amendment. As one of these objectors, Jefferson as President refused to proclaim national days of prayer because he supposed such action prohibited by the Constitution, as an enforced observance of creed, but every President since elected has given a contrary interpretation. Even this, however, says

nothing of Jefferson's attitude toward impartial government aid of religion, but was only another example of his frequently emphasized insistence upon complete freedom of the human mind from all tyranny.

That the practices of the Congress which for 160 years have recognized religion are entitled to weight as a practical construction of the Constitution follows from the fact that such practices were early and frequently challenged as violations of the establishment of religion clause of the First Amendment. In the 32nd Congress, a number of petitions were received asking the abolition of the office of chaplain in the army and in the navy, and such petitions were referred to a senate committee. Its report is most illuminating as to the meaning given this Constitutional provision at that time. (*Reports of Committees of the Senate*, 32nd Cong., 2nd Sess., 1852-1853; Senate Report No. 376, January 19, 1853).

An 1853 Senate Report on the Meaning of "Establishment of Religion".

In referring to the Constitutional clause under discussion the report stated, p. 1:

"The clause speaks of an 'establishment of religion.' What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother country, and its meaning is to be ascertained by ascertaining what that establishment was. It was the connexion with the state of a particular religious society, by its endowment, at the public expense, in exclusion of, or in preference to, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observances. These three par-

ticulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided."

In laying down the tests of a law respecting an establishment of religion, the Committee continued:

"If congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions— such law would be a 'law respecting an establishment of religion,' and, therefore, in violation of the constitution. But no law yet passed by Congress is justly liable to such an objection. Take, as an example, the chaplains to Congress. At every session two chaplains are elected —one by each house— whose duty is to offer prayers daily in the two houses and to conduct religious services weekly in the hall of the House of Representatives. Now, in this, no religion, no form of faith, no denomination of religious professors, is established, in preference to any other, or has any peculiar privileges conferred upon it. The range of selection is absolutely free in each house amongst all existing professions of religious faith."

After holding that appointment of chaplains in the Congress was not "justly obnoxious to the reproach of invading religious liberty in the widest sense of that term", the Committee answered the argument of the petitioners that the army and navy chaplains formed a "national chaplaincy" which like a national church was an establishment of religion, as follows:

"A national church implies a particular church selected

as the church of the nation, endowed with peculiar privileges, or sustained or favored by the public in preference to other churches or religious societies. Of such a church we have no semblance, nor have we any such chaplaincy. We have chaplains in the army and navy, and in Congress; but these are officers chosen with the freest and widest range of selection—the law making no distinction whatever between any of the religions, churches or professions of faith known to the world. Of these none, by law, is excluded; none has any priority of legal right. True, selections, in point of fact, are always made from some one of the denominations into which Christians are distributed; but that is not in consequence of any legal right or privilege, but the voluntary choice of those who have the power of appointment."

At page 4 of the report the Committee said:

> If this had been a violation of the constitution—an establishment of religion—why was not its character seen by the great and good men who were coeval with the government—were in Congress and in the Presidency when this constitutional amendment was adopted? They were wise to discover the true character of the measure; they, if anyone did, understood the true purport of the amendment and were bound, by their duty and their oaths, to resist the introduction or continuance of chaplains, if the views of the petitioners were correct. But they did no such thing; and therefore we have the strongest reason to suppose the notion of the petitioners to be unfounded. Unfounded it no doubt is. Our fathers were true lovers of liberty, and utterly opposed to any constraint upon the rights of conscience.
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> * * *
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> They [framers] intended, by this amendment, to prohibit "an establishment of religion" such as the English church presented, or anything like it. But they had no fear or jealousy of religion itself, nor did they wish to see us an irreligious people; they did not in-

> tend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators; they did not intend to send our armies and navies forth to do battle for their country without any national recognition of that God on whom success or failure depends; they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy. Not so had the battles of the revolution been fought, and the deliberations of the revolutionary Congress conducted. On the contrary, all had been done with a continual appeal to the Supreme Ruler of the world and an habitual reliance upon His protection of the righteous cause which they commended to His care.

This is a thoughtful analysis of the meaning and import of the initial prohibition of the first amendment made by a group of United States Senators in the exercise of their constitutional duties. They made this exposition within sixty-four years of the adoption of the amendment and may naturally be assumed to have had a better understanding of its environment and connotation than can anyone living nearly a hundred and sixty years after such adoption.

Additional Practical Executive and Congressional Construction of "Establishment of Religion".

While the circumstance that the Federal Government was one of delegated and restricted powers operated to minimize the instances in which it had occasion to legislate with reference to religion, to the extent that the new government operated in these fields, no disposition was evidenced to avoid equal, impartial aid to religion. Grants of land and public funds were made to denominational colleges, lands were granted to missions established on the public domain, and religious schools were employed until 1899 to give instruction to Indian tribes. The latter prac-

tice is reviewed in some detail in the official report of *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908) to which reference is made later, and see, *Public Funds for Church and Private Schools*, (1937), Richard J. Gabel, pp. 173 *et seq.*

Practical Construction of "Establishment of Religion" by State Constitutions.

A most illuminating example of the unanimity with which the words "establishment of religion" have been given the practical construction for which we contend is found in the use of similar words in state constitutions.

We have already given attention to the wording of these constitutions at the time of the adoption of the First Amendment and have shown how the language used in this amendment grew out of somewhat similar provisions in certain of those state constitutions, which were plainly designed only to prevent the preferment by law of one religion over another. Let us now turn to an examination of present state constitutions to see to what extent the framers of these organic laws saw in the words "no law respecting an establishment of religion", a prohibition against use of public funds for the equal and impartial benefit of religion. Four states, and four only, of the forty-eight, with the Federal Bill of Rights prominently before all of them as a model, have used the words with which we are concerned.

The first ten amendments have been liberally drawn upon and are frequently lifted almost in their entirety—yet only four states have used the "establishment of religion" clause. If, as contended, this clause is a broad, clear expression preventing aid to religion in any form and to any religious institution, what accounts for the paucity of its use? But far more important is the fact that not one of these four states has relied upon this language of

the First Amendment to prevent equal, non-preferential aid to religion. On the contrary, every one of them has incorporated either into the same or a different article of its constitution specific prohibitions of the use of public funds for the support of religion, equally or otherwise.

Are we to suppose that the lawyers of these states, who were so liberally represented in the Constitutional Conventions which drafted these frames of government, were so obtuse that they could not understand what is now said to be so clear? Or is it not more reasonable to suppose that this is but another part of the great and uniform stream of interpretation which has recognized and fixed the meaning of the words "establishment of religion" as a national or state church or religion, preferred over other religions?

A brief reference to the constitutions of the four states mentioned will be sufficient to make the point:

Art. I, Sec. 3, of the Constitution of **Iowa** (1857) is in part as follows:

> "The general assembly shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;"

Nevertheless, this same article continues as follows:

> "Nor shall any person be compelled to attend any place of worship, pay tithes, taxes or other rates for building or repairing places of worship, or the maintenance of any minister or ministry."

Art. 4 of the Constitution of **Louisiana** (1921) is in part as follows:

> "Every person has the natural right to worship God, according to the dictates of his own conscience, and no law shall be passed respecting an establishment of religion".

Nevertheless, Article 53 of the same constitution provides:

"No money shall ever be taken from the public treasury, directly or indirectly in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preferences shall ever be given to, nor any discrimination made against any church, sect or creed of religion * * * ".

Art. 1, Sec. 4 of the Constitution of **South Carolina** (1895) is in part as follows:

"The general assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ".

Nevertheless, Art. 11, Sec. 9 of the same constitution provides:

"The property or credit of the State of South Carolina or any county, city, town, township, school district, or other subdivision of the state, or any public money, from whatever source derived shall not, by gift, donation, loan, contract, appropriation, or otherwise, be used directly or indirectly, in aid of or maintenance of any college, school, hospital, orphan house, or other institution, society or organization, of whatever kind, which is wholly or is part under the direction or control of any church or of any religion or sectarian denomination, society or organization."

Art. 1, Sec. 4 of the Constitution of **Utah** (1895) is in part as follows:

"The state shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * * ".

Nevertheless, a further provision of the same article and section, is in part as follows:

" * * * no public money or property shall be appropriated for or applied to any religious worship, exer-

cise or instruction, or for the support of any ecclesiastical establishment."

In the case of each of these states, the framers obviously thought that the language prohibiting an establishment of religion was not sufficient, standing alone, to prevent the expenditure of public funds for the equal aid for religious institutions, including schools. Consequently, when they as sovereign states were stating their own legislative and constitutional policy, with regard to tax support of religious education, they felt a necessity for using different language than is contained in the First Amendment. This is a practical, but deliberate, interpretation of the meaning of the First Amendment.

Tax Exemption as a Practical Construction of "Establishment of Religion".

One other practical construction has been placed upon the words "no law respecting an establishment of religion". This has been accomplished by legislation of every one of the states and by the Congress of the United States, not by single acts, but by a chorus of full harmony from the inception of the Federal Government. Each of these governments, the States usually by constitutional provisions, and all by implementing legislation, have expressly exempted from taxation all religious organizations or, in the alternative, property used for religious purposes. This has been accomplished by varying language and to different extents, but all have liberally and equally and non-discriminatively extended the exemption. * This

* This tax exemption may be granted or withheld by Congress and state legislatures free of Federal constitutional provisions, except where a tax is sought to be imposed upon the direct exercise of a right guaranteed by

has been, of course, a direct and equal aid or benefit to religion amounting to hundreds of millions of dollars annually and is fully consistent with, and illustrative of, the constitutional interpretation for which we contend. It is equally in such sharp and violent conflict with the supposition that the words being examined proscribe any aid to religion—even equal and non-discriminatory—that such tax exemption must either be considered as the greatest anomaly in modern jurisprudence, or it must be given its true significance as an unmistakable evidence of the correctness of our thesis.

Who would have the temerity to suggest, in a case challenging the right of the State of Illinois to grant tax exemptions to religious organizations, that the First Amendment forbade such exemption as an aid to religion?

Use of Public Buildings for Religious Meetings.

A final, persuasive practical interpretation has been given the First Amendment, not by legislative deliberations, but by the customs and usages of the American people as a whole. This has been accomplished by the free and equal use of school buildings, court houses and town

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the Federal constitution. See *Gibbons* v. *District of Columbia*, 116 U.S. 404, 408 (1886) where it is said:

> "In the exercise of this power, Congress, like any state legislature unrestricted by constitutional provision, may at its discretion wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property".

That complete tax exemption is not demanded by the First Amendment is implicit in *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943):

> "We do not mean to say that religious groups and the press are free from all financial burdens of government".

halls in most of the states for numerous social, educational, recreational and religious meetings. This practice began in early colonial times and is a feature of American life as widespread now as in the lifetime of Jefferson.**

That this is a significant custom, the appellant prominently admits in the opening portion of her argument, (brief, p. 15). There the Court will find authorities and references to annotations which deal with the use of school buildings by religious groups and show frequent approval of such use.

Illustrative of this is the case of *Nichols* v. *School Directors*, 93 Ill. 61, (1879). There the attack was upon the use of school buildings for holding religious services outside of school hours. Notwithstanding the strict provisions of the Illinois Constitution, Article 2, Section 3, and Article 8, Section 3, prohibiting appropriation or payment of public money in aid of religion, the court upheld the constitutionality of such use, saying (p. 64):

"Religion and religious worship are not so placed

**In a letter of November 2, 1822 to Dr. Thomas Cooper of Philadelphia, who had been offered earlier the first professorship of the University of Virginia (Jefferson, *Writings*, Memorial Assn. Ed., 1904, XIX, pp. 367, 377, 381), Jefferson referred with apparent approval to the custom of using the county courthouse for religious services. He wrote, in part (Jefferson, *Writings* (1904), XV, p. 404; Jefferson, *Works* (1861) VII, p. 266; Jefferson, *Writings* (1905, Ford ed.) XII, p. 270):

> "In our village of Charlottesville, there is a good degree of religion, with a small spice only of fanaticism. We have four sects, but without either church or meeting-house. The court-house is the common temple, one Sunday in the month to each. Here, Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in hymning their Maker, listen with attention and devotion to each others' preachers, and all mix in society with perfect harmony."

under the ban of the constitution that they may not be allowed to become the recipient of any incidental benefit whatsoever from the public bodies or authorities of the State. That instrument itself contains a provision authorizing the legislature to exempt property used for religious purposes from taxation; and thereby, the same as is complained of here, there might be indirectly imposed upon the taxpayer the burden of increased taxation, and in that manner the indirect supporting of places of worship. In the respect of the possibility of enhanced taxation therefrom, this provision of the constitution itself is even more obnoxious to objection than this permission given by the school directors to hold religious meetings in the school house. There is no pretense that it is in any way in interference with the occupation of the building for school purposes."

In only a handful of States has the practice of allowing religious groups the use of public buildings been forbidden and then only because of highly restrictive constitutional prohibitions against use of public funds (and sometimes, also, public property) for sectarian purposes. Never, so far as our research discloses, has it been successfully challenged on the ground that it was a violation of the First Amendment or of any state constitutional provision having only the language of the First Amendment.

It is perhaps true that this practice, which long antedated our written constitutions and has continued for more than a century and a half after their adoption, may be somewhat narrower than our thesis that the establishment of religion clause leaves direct, equal, and non-discriminatory aid to religion unproscribed. But equally true is it that this custom stamps with approval all—and more than all—that is involved in the use of school buildings in the instant case.

Interpretation of the Establishment of Religion Clause by Text Writers and Adjudicated Cases.

In discussing the religious clauses of the First Amendment, Mr. Justice Story writing in 1833 in his *Commentaries on the Constitution of the United States*, made it clear that the First Amendment was not designed to be unfriendly to religion, but rather to preserve an equality between sects, and, most important, to leave the matter of religion entirely to the states. Story stated, in part (5th ed., 1891, v. II, sec. 1873) that "every American colony, from its foundation down to the revolution, with the exception of Rhode Island, if, indeed, that State be an exception, did openly, by the whole course of its laws and institutions, support and sustain in some form the Christian religion; and almost invariably gave a peculiar sanction to some of its fundamental doctrines. And this has continued to be the case in some of the States down to the present period [1833] without the slightest suspicion that it was against the principles of public law or republican liberty".

Story then sets out in the same section sufficient of the Massachusetts Bill of Rights to show "its pointed affirmation of the duty of government to support Christianity, and the reasons for it". This Bill of Rights provided in part that "the legislature shall from time to time authorize and require, the several towns, parishes, etc., to make suitable provision at their own expense for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion, and morality, in all cases where such provision shall not be made voluntarily".

In section 1874, the author continues:

> Probably at the time of the adoption of the Constitution, and of the amendment to it now under con-

sideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Coming to the "real object of the amendment," Story says (sec. 1877):

> The real object of the amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age.

Nowhere in Story's work is there even an intimation that the purpose or effect of the First Amendment was to prevent the use of public property for the equal benefit of all religions.

Another text writer of highest standing on Constitutional questions is Judge Thomas M. Cooley who in dealing with state constitutions places the following under the heading of "Any law respecting an establishment of religion" (Cooley, *Constitutional Limitations*, p. 469; (4th ed. 1878), p. 584):

> The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State

> and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.

The subsequent paragraphs in which Cooley summarizes the explicit provisions in state constitutions against state aid to sectarian religion and sectarian education are no part of the author's discussion of a law respecting "an establishment of religion", thus plainly indicating his view that such subjects were not includible under a discussion of an establishment of religion.

Edwin S. Corwin in the eighth edition of his work "The Constitution—What It Means Today", published in 1946, states (p. 150):

> "An establishment of religion means a state church, such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution."

We find no text writer who suggests that the establishment of religion clause of the First Amendment prevents the use of public property for the equal and non-preferential benefit of religious bodies. In considering the meaning of the clause, it is important to keep constantly in mind the fact that state-court cases are usually based upon specific provisions of state constitutions against appropriation of money and, in many cases, use of state property. Hence, the decisions of state courts dealing with their own constitutions are not persuasive of the meaning of the establishment of religion clause of the First Amendment to the Federal constitution. The only cases of value are those interpreting that constitution.

None of the cases in this Court, prior to *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, (1947), called for any definition of the establishment of religion clause of the First Amendment. However, the mere references to this clause that do appear in the reports of this Court prior to the *Everson* case are entirely consistent with and tend to sustain the meaning for which we contend. Thus, *Davis* v. *Beason*, 133 U.S. 333, (1890) a criminal prosecution sought to be defended on the ground that polygamy was a matter of religious belief which was protected by the First Amendment, contains language by Mr. Justice Field, which really defines the establishment of religion clause of the First Amendment as follows (p. 345):

> "It is assumed by counsel of the petitioner, that because *no mode of worship can be established* or *religious tenets enforced* in this country, therefore any form of worship may be followed and any tenets, however destructive of society, may be held and advocated, if asserted to be a part of the religious doctrines of those advocating and practicing them. But nothing is further from the truth. Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everything which may be so called can be tolerated." (Italics supplied).

The italicized words, which obviously refer to the establishment of religion clause, succinctly describe what is meant by that clause—no mode of worship can be established and its observance enforced by law. This is strikingly similar to the explanation given by James Madison in the Congressional Debates already quoted above, p. 41.

In *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), this Court refused to enjoin payment of public moneys to a hospital in the District of Columbia which was under Roman Catholic sponsorship. The case came up on the allegations of

the complainant's bill for an injunction. The plaintiff based his claim upon the contention that Congress had no power to make "a law *respecting a religious establishment*" which led Mr. Justice Peckham, writing the opinion for a unanimous Court, to state (p. 297) that this was "a phrase which is not synonymous with that used in the Constitution which prohibits the passage of a law *'respecting an establishment of religion'*".

In *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940), the first case expressly stating that the Fourteenth Amendment imposes on the states observance of the religious clauses of the First Amendment, this Court, by Mr. Justice Roberts, interprets the words, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof", as follows (p. 303):

> "The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the amendment embraces two concepts,—freedom to believe and freedom to act."

This quotation clearly indicates that the establishment of religion provision "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship" and does not imply that it contained any broader prohibition. The language used in this opinion of the Court is almost identical with the wording adopted by the United States Senate on September 9, 1789 (p. 46, above) to express the Senate's meaning of an establishment of religion: "Congress shall make no law establishing articles of faith or a mode of worship" etc.

Certain other cases are referred to in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 15, Note 21, but those cases do not in anywise define the establishment of religion clause of the First Amendment. For example, *Terrett* v. *Taylor*, 9 Cranch (U.S.) 43, involved the validity of Virginia statutes seeking to subject to sale by the overseer of the poor the lands formerly belonging to the Anglican Church. The First Amendment to the Federal Constitution was not involved. In discussing the laws of Virginia, Mr. Justice Story said (p. 49):

> "Consistently with the constitution of Virginia the legislature could not create or continue a religious establishment which should have exclusive rights and prerogatives, or compel the citizens to worship under a stipulated form or discipline or to pay taxes to those whose creed they could not conscientiously believe. *But the free exercise of religion cannot be justly deemed to be restrained by aiding with equal attention the votaries of every sect to perform their own religious duties*, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead." (Italics supplied.)

Reynolds v. *United States* 98 U.S. 145, (1879), is discussed above (p. 26) sufficiently to show that the matter then before the Court, a prosecution for polygamy, did not in anywise involve the "establishment of religion" clause of the First Amendment. The discussion of the meaning of the First Amendment which appears in that case answered the defendant's argument that he could not be punished for polygamy because polygamy was an exercise of his constitutional right to freedom of religion. The case did not involve in anywise the possible financial relationships between Government and religious education.

Watson v. *Jones*, 13 Wall. (U.S.) 679 (1872), did not involve the meaning of the establishment of religion clause,

and the Court did not undertake to define it. What was there involved was the question of the jurisdiction of a court of equity to adjudicate a property dispute between factions of a Presbyterian congregation which had divided on the slavery issue. The quotation from a South Carolina case, *Harmon* v. *Dreher*, 1 Speer's Eq. 17, 120 (1843), which is referred to in the *Everson* case is as follows:

> "The structure of our Government has, for the preservation of civil liberty, rescued the temporal from religious interference. On the other hand, it has secured religious liberty from the invasions of the civil authority."

That this highly generalized statement has nothing to do with the specific question now before this Court is clear from the fact that the *Harmon* case, from which the quotation was taken, was a suit by a minister claiming certain rights in the use of church property notwithstanding his expulsion as one of the members of the synod. The subject under discussion in the *Harmon* case was what effect should be given by the Court to the action of the ecclesiastical authority in expelling the minister. It gave full effect to such action.

At page 728 of the opinion, the Court also said:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

This statement was simply a declaration that our law favors no one sect or religion over another. It is not a statement that government is forbidden impartially to aid all religion.

Quick Bear v. *Leupp*, 210 U.S. 50 (1908), was a suit to enjoin payment of monies to a Catholic mission school, appropriated by Congress from Indian trust and treaty funds for the education of Indians of the Sioux tribe. The *Quick Bear* case is entitled to more than passing notice because of what we consider to be an erroneous

statement of its holding in a footnote of one of the dissenting opinions in the *Everson* case, 330 U. S. 1, 43, Note 35. A reading of the *Quick Bear* case does not substantiate either of the two statements made in such note, (1) that the constitutional question "was squarely raised", and (2) that "it was stated also that such a use of public monies would violate both the First Amendment and the specific statutory declaration involved, namely, that 'it is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school' ". On the contrary, from this Court's statement in *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908), it is clear that for eighty years—commencing in 1819 (p. 58) and ending in 1899 (p. 61)—the Congress had appropriated public moneys (not limited to trust or treaty funds) for the education of Indians in schools conducted by religious societies and that in the *Quick Bear* case the Attorney General argued (210 U.S. 50, 73-74):

> "'There is no constitutional question. For eighty years Congress extended aid out of the public funds to mission schools of various denominations, finally withdrawing it because of opposition among the people at large and because the time had thus arrived for establishing distinctive government schools. If there were a valid constitutional objection to the earlier course, it is probable that it would have been discovered during that period of eighty years. The Constitution provides that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.' A religious establishment, however, is not synonymous with an establishment of religion. See *Bradfield* v. *Roberts*, 175 U.S. 291, upholding an appropriation for a Roman Catholic hospital."

In response to this argument, and apparently approving it, this Court, by Mr. Chief Justice Fuller, stated (p. 81-82):

> "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic

Indian Missions. *It is not contended that it is unconstitutional, and it could not be. Roberts* v. *Bradfield*, 12 App. D.C. 475; *Bradfield* v. *Roberts*, 175 U.S. 291.

"But it is contended that the spirit of the Constitution requires that the declaration of policy that the government 'shall make no appropriation whatever for education in any sectarian schools' should be treated as applicable, on the ground that the actions of the United States were to always be undenominational, and that, therefore, the government can never act in a sectarian capacity, either in the use of its own funds or in that of the funds of others, in respect of which it is a trustee; hence, that even the Sioux trust fund cannot be applied for education in Catholic schools, even though the owners of the fund so desire it. But we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof." (Italics supplied.)

The specific holding of this Court was that payments of Indian *trust funds* and *treaty funds* to the Bureau of Catholic Indian Missions for education of Sioux Indians was not prohibited by a *statute* which, the Court held, applied only to public funds. However, the history given, the argument of the Attorney General, and the language of the Court in response to such argument show a practical construction of the Constitutional provision which is in our favor.

What a "law respecting an establishment of religion" means.

The word "establishment", in the First Amendment was deliberately used in the final compromise between the House and Senate versions of the First Amendment and cannot be disregarded. The phrase cannot be read as though it

prohibited every "law respecting religion". "Respecting", as used in the amendment, of course means "relating to" or "concerning" in the broad sense. As elaborately pointed out above, "establishment of religion" means "a religion or religions preferred by law over all other religions."

To disregard "establishment of" is to violate the fundamental canon of construction already mentioned that every word must be given meaning and no word is to be disregarded as meaningless. Furthermore, the House of the First Congress rejected Livermore's version forbidding the making of any law "touching religion" (pages 42, 44, above), so there is added reason for refusing to disregard the words "establishment of".

We further submit that the First Amendment does not use the word "establishment" as synonymous with "promotion" or "assistance" but is limited by every historical consideration and the plain meaning of the phrase "establishment of religion" to the preferment by law of one religion over another. If "establishment" be treated as synonymous with "assistance" or "promotion" or the words "establishment of" be entirely disregarded, the clause is given the very meaning of hostility to religion which the debates and congressional history of the amendment indicate was intended to be avoided by changing the House version of the amendment "Congress shall make no law establishing religion" to the final form, "Congress shall make no law respecting an establishment of religion".

Similarly, if the true historical meaning be preserved, the word establishment does not refer to a religious institution so as to prohibit all laws respecting religious institutions. "Establishment" was not used in that sense, and as Mr. Justice Peckham pointed out in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899), the constitutional phrase "an establishment of religion" is not an equivalent to "a religious

establishment" if the latter be used to mean a "religious institution" in the same sense that a school, church building, or even an incorporated body not having a preference of the kind inherent in the meaning of the word "establishment", is an "institution" or "establishment". The historical meaning of the word "establishment" precludes its having been used in the First Amendment in the sense of an "undertaking establishment", or a "dry-goods establishment", or a "liquor establishment".

As to the meaning of the word "religion", it is correct that the one word "religion" is common to both the establishment of religion and the freedom of religion clauses, but the meeting ground is a grammatical one. Modifying words which are not common to both clauses and the context and purpose of each clause tend to give the word "religion" a broader meaning as part of the freedom clause than the historic meaning of the word "establishment" permits the word "religion" to receive when used as a grammatical portion of the words "an establishment of religion." To give a homely, extreme (and, therefore, perhaps poor) illustration of our point, if one refers to "black and white horses", the word "horse" is common to both, but the modifying words make them "horses of a different color".

The same reasons for giving an expanded meaning to the word "religion" as it pertains to freedom of opinion and thought do not obtain when "religion" is considered as a part of the clause, "establishment of religion".

To be specific: An expanded meaning of the word "religion" in the freedom of religion clause will protect freedom for all shades of thought. That does not require that the word "religion" be given the same meaning when treated as part of the clause "establishment of religion". The freedom clause deals with the human mind, the depths

of which cannot be plumbed; the establishment of religion clause deals with a human institution, "an established religion", which historically—and today—is a much more definite concept than the concept of the religion of an individual. There is nothing incongruous in treating them decisionally on a different basis—certainly not more incongruous than holding that the words "United States" are used in different meanings in the Federal Constitution.*

The freedom of religion clause governs and protects an individual against the state in the exercise of his religious liberty, while the "establishment of religion" clause deals directly with the relationship of government to an organized religion and only indirectly with the individual, thereby making it a three-way matter: government, church and individual.

[Except for its helpfulness, if any, in analyzing the two religious clauses of the First Amendment, the above distinction is of no importance on the facts of the present case. There is presented here no discrimination between religion on the one hand and atheism on the other. The appellee, Board of Education, concedes that both are entitled to receive equal treatment in the operation of the plan of religious education, and that both are entitled, on the same terms, to the permission of the Board of Education to use schoolrooms and to release pupils from their public school class—the sole participation of the Board in the plan.]

The above meaning of "respecting an establishment of religion" is, we submit, the only one which the plain meaning of the words used and the history of the enactment of the First Amendment can sustain.

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* *Downes* v. *Bidwell*, 182 U.S. 244, 262-263; *Loughborough* v. *Blake*, 5 Wheat. (18 U.S.) 317, 319.

The School Board Has Not Violated the Establishment of Religion Clause of the First Amendment.

Applying such a test to the present case, and assuming for this argument that the clause is made applicable to the states by some portion of the Fourteenth Amendment, the action taken by the defendant Board of Education is clearly not within the proscription of the First Amendment.

No preference between religions or between sects has been pointed out, and the undisputed testimony is that the same plan is open to all (Tr. 118-119). This includes unbelievers (Tr. 119). While the superintendent of schools indicated that it would be hard to deal separately with individual groups (Tr. 127), he also testified that the class room is available to Jehovah's Witnesses (described in his testimony as "people who teach religion to the effect that saluting the flag is wrong") but added "they have never asked for it" (Tr. 118). The president of the school board testified that "the religious people" who had asked for the approval of the plan "were all to be treated alike" (Tr. 127). There has been no complaint that they were not (Tr. 159). The trial court made all of above findings (Tr. 65).

The distinction must be made again here between the actions of the voluntary Council of Religious Education and the school board. Unless and until some atheist has asked and been refused permission to use a school room to instruct children whose parents request their children to be instructed in atheism, no constitutional right of any atheist is infringed. The fact that an atheist might not be welcomed into the religious education council shows no denial of his rights, for the school board does not require that an atheist or any group be a part of the council before being recognized by the school board. What is open to attack here is

not what somebody guesses may happen, but what actually has happened. To complain of an unconstitutional law, one must be the victim of it.

Lehon v. *City of Atlanta*, 242 U.S. 53, 56 (1916).

There may be an argument made in this case that because there are a large number of varying religious opinions, no system of released school time which requires the use of school rooms can be non-preferential, because, it may be argued, there will not be enough separate rooms for each group. A complete answer to that argument is that it presupposes a situation which has not occurred in Champaign and of which there is no reasonable certainty that it will occur. As far as constitutional rights are concern d, there will be time enough to decide them when the situation presupposed shall have actually occurred—when some religious sect or atheistic group has been denied the use of facilities on the same basis as existing groups are permitted to use them. So long as facilities are available for the non-preferential operation of the plan no constitutional question is raised by the mere conjecture that so many sects may wish to have separate classes that the continuance of the plan is endangered. There will be time enough to cross that bridge when we come to it. This problem is no different than the similar one of accommodating all individuals or groups who may desire to exercise the rights of free spe h or assembly in parks or streets.

There is a further intimation that because small classes will be sent to small rooms and large classes will use large rooms, the operation of the plan is preferential. We deem such an argument too unsubstantial on any theory of constitutional law to justify an answer. It will be obvious that small rooms best accommodate small groups and large ones best accommodate large groups.

It is argued that even though aid to religious groups incurs no expense, the school board may not permit such aid because government must be "neutral" between religion and other beliefs. So long as the school board offers to treat irreligious groups on the same basis as the religious groups, no lack of neutrality is shown.

The theory that government may not aid all religion for fear of appearing unneutral as between religion and irreligion is a misapplication of the establishment of religion clause. An essential difference between the freedom of religion clause and the establishment of religion clause ought to be noticed in determining the operation of each.

In dealing with religious liberty, this Court has said, by Mr. Justice Douglas in *United States* v. *Ballard*, 322 U.S. 78, 86 (1944):

> "Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *West Virginia State Bd. of Edu.* v. *Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and death and of the hereafter which are rank heresy to followers of the orthodox faiths".

It follows from this that whether thoughts be classified as religious, unreligious, irreligious, or in any other way, the resulting right of belief, of opinion, and of thought is always an absolute right. That, however, does not necessarily make it a "religion" under the "establishment of religion" clause.

The freedom of religion clause deals with the individual. The establishment of religion clause, although doubtless enacted through a desire to forestall religious persecution of the individual, does not operate directly upon the individual, but seeks to protect his rights through controlling the relationship between organized religion and government. (Story, *Commentaries*, 5th ed., 1891, sec. 1877.)

While the end sought is similar, the method of achieving the end is different. In dealing with the establishment of religion clause, we are dealing with religious groups, and there the law is satisfied by equality between religions. (Story, *Commentaries*, 5th ed., 1891, sec. 1877). While the establishment of religion clause required the government to be neutral between sects, it did not require it to be unfriendly to all religion (Story, *Commentaries*, 5th ed., 1891, sec. 1874).

James Madison made a clear distinction between rights of conscience, (freedom to believe), and the relationship between government and religion. It will be recalled that the proposed constitutional amendments which he introduced into the First Congress included a fifth proposition (p. 39, above) that "No state shall violate the equal rights of conscience * * * ". This fifth proposition was a limitation solely upon the States and contained rights which he said he considered so fundamental as to require a "double security" against the acts of any government, either State or Federal (Annals of Congress, I, p. 441).

This proposal of Madison's is important in drawing the distinction between the fundamental freedoms which required a guarantee against all governmental action, State and Federal, and those requiring only guarantee against Federal action. It is immediately apparent, since he did not seek to prevent the states from establishing a religion or to require them to disestablish existing state-favored religions, that he did not consider the prevention of an established religion to be as fundamental as the rights of conscience.

The fact that the establishment of religion clause and the freedom of religion clause are both in the First Amendment, does not require that they be given the same application. *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, 427 (1934).

To treat the establishment of religion clause as something erecting a quarantine between all religion and government in the same way that the individual's freedom of thought is protected against all government action under the freedom of religion clause disregards the undoubted fact, which has been repeatedly determined by judicial decision, that this is a religious nation. The religious liberty of an individual is protected against the possible tyranny of a state church by equal and non-preferential treatment of all religions, without restraining the government from recognizing all religions impartially:

Holy Trinity Church v. *United States*, 143 U.S. 457 (1892).

Wilkerson v. *City of Rome*, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334 (1922).

Gordon v. *Bd. of Edu. of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488 (1947).

People ex rel. Latimer v. *Board of Education of City of Chicago*, 394 Ill. 228; 68 N.E. 2d. 305 (1946).

Reichwald v. *Catholic Bishop of Chicago*, 258 Ill. 44; 101 N.E. 266 (1913).

In the last case, the court said (p. 48):

> "The man of no religion has a right to act in accordance with his lack of religion but no right to insist that others shall have no religion".

When acting under the "freedom of religion" clause, there can, of course, be no attempt to determine even the nature of the individual's belief. The Constitution, having been drafted by men friendly to religion, did not, however, require the government to go further under the "establishment of religion" clause than to require equal treatment in law *of all religions*.

Applying the establishment of religion clause of the First Amendment as interpreted above, it is clear that

the action of the Board of Education of the Champaign school district in permitting a use of school premises for religious instruction upon the responsibility and at the expense of the Champaign Council of Religious Education has not in anywise violated the appellant's constitutional rights under said clause. Under the authorities, a law is not one respecting an establishment of religion unless it favors or tends to favor one sect or one religion over another. Even treating atheism, for the purposes of this case, as a religion within the meaning of the First Amendment—an assumption which would have horrified the Framers—, there still is no unconstitutional discrimination against the appellant because she has never demanded and the Board of Education has never refused to give equal rights to atheists to hold classes in the school buildings similar to those held by the religious groups.

It is further argued that the alleged expenditure of public funds for the religious education classes is a benefit to religion prohibited by the establishment of religion clause.

In essence, the question before the Court is whether the establishment of religion clause just as broadly prohibits appropriation of monies for a sectarian purpose as do the elaborate and specific constitutional provisions of the states against such appropriations. At no time prior to the decision of the *Everson* case was there any suggestion that the "establishment of religion clause" was the equivalent of these constitutional provisions of the states.

In *"American Church Law"* (1933), the author, Carl Zollmann, states without apparent hesitation (sec. 74, p. 86):

> "There is no provision in the Federal Constitution prohibiting the appropriation of public funds to sectarian purposes."

He continues:

> "Therefore the federal government is at liberty to make contracts with church-controlled hospitals, and may grant out and out donations to sectarian institutions. In regard to Ohio, Congress has not only appropriated section 16 to the use of the public schools, but has actually granted section 29 within a limited area to the use of religion."

We do not deny that a tax statute may be one which, by preference to a particular religion or a particular sect, constitutes a law "respecting an establishment of religion".

Concededly, one form in which a forbidden preference to a religion might be embodied would involve the appropriation of public money. On the other hand, as Story points out (Commentaries on the Constitution, 5th edition, 1891, II, sec. 1872) there are a number of ways of creating an "establishment of religion" by different methods of preferring one over another. Hence, a law respecting an establishment of religion might give a preference without imposing a tax, and we think it clear, that, as far as the First Amendment is concerned, tax support or, more commonly, tax exemption, may be given if no preference is thereby given. *The presence or absence of a tax is not the thing which determines whether a law is one "respecting an establishment of religion".*

If this Court should hold that the equal and non-preferential use of State funds or property for religious purposes, to the extent permitted by the State constitution, is a violation of the establishment of religion clause of the Federal Constitution, then it would have to hold that a similar exemption from taxation is an unlawful benefit, for an exemption is in essence an appropriation, as held by the Supreme Judicial Court of Massachusetts in *Massachusetts General Hospital* v. *Inhabitants of Belmont*, 233 Mass. 190, 203; 124 N.E. 21, 25 (1919):

> "An exemption from taxation is in the nature of an appropriation of public funds, because, to the extent of the exemption, it becomes necessary to increase the rate of taxation upon other properties in order to raise money for the support of government."

From what has been told above of the true meaning of the "establishment of religion" clause, it seems clear that unless there is a preferment of one or more sects or religions over other sects or religions, a law, whether or not it involves a tax or an appropriation, is not a law "respecting an establishment of religion". Unless, therefore, the action of the Board of Education in the present case constitutes a law favoring one or more sects over others it does not violate the establishment of religion clause regardless of whether, in the operation of the system, public monies be expended. The expenditure of public monies was a question for the Supreme Court of Illinois under the stringent provisions of the Constitution of Illinois,* but we submit it is not a concern of this Court

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* Article II, Sec. 3 of the Constitution of the State of Illinois provides in part:

> "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions; * * * No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship."

Article VIII, sec. 3, is as follows:

> "Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or sci-

under the First Amendment when the charge of preferential treatment has been eliminated.

It seems more appropriate to discuss the fact that no public monies are appropriated and that no expenses incurred, to the detriment of the appellant, under point III, below, which deals with her contention that the Fourteenth Amendment prohibits the action of the School Board because of the claim that it is a use of public monies for a private purpose. It is enough to say here that if there is any expenditure of public money, which we deny, it is not a forbidden preference to any sect or to any religion under a proper construction of the establishment of religion clause of the First Amendment.

Historically, there seems to be no question that the use of public property, impartially, for religious services or teaching, was not considered unconstitutional even under the Virginia concept of relationship between church and state. This is amply proved by the following.

Thomas Jefferson Approved Use of Public Buildings for Voluntary Religious Education Classes.

If the acts of the school board assailed here were to be held unconstitutional, great reliance must of necessity be placed upon the theory that they offend the First Amendment and that the First Amendment incorporates the provisions of the Virginia Bill for Establishing Religious Freedom, with all of its political and emotional overtones acquired as a result of Madison's Memorial and Remonstrance. Furthermore, since Jefferson's letter of January 1, 1802 mentioning the "wall of separation between Church

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entific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation, to any church, or for any sectarian purpose."

and State" is the only authority cited by this Court in *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 15-16, in direct support of the Court's definition therein of the establishment of religion clause of the First Amendment, it would seem to be a conclusive answer to the charge of invalidity if we could demonstrate that Jefferson was not opposed to voluntary religious education conducted on public property and with the co-operation of educational institutions supported by public funds.

In other words, with so much reliance being of necessity placed on Jefferson's views by our opponents in this case, in briefs already filed and sought to be filed, it must be correct to say that if Jefferson was not opposed to, but in his own day approved, the plan of voluntary religious classes adopted in the present instance, then the opposition to such classes on constitutional and legal grounds must fail.

There exists irrefutable evidence that Thomas Jefferson, himself, did approve a similar plan. Most significantly, such approval came from him while he was in a position of official responsibility as Rector of the University of Virginia, long after the passage of the Virginia Bill for Establishing Religious Freedom, of which he was the author, and while that law was in force. Even more significantly, Jefferson's approval was given only after thoughtful and deliberate consideration of the constitution and laws of Virginia. In that situation, a program for religious education identical in relevant respects to that now used in Champaign, Illinois, was approved by Thomas Jefferson at the University of Virginia in order to comply with what he considered to be the commands of the Virginia constitution and statutes, and still enable the University to fill what he described as a "chasm" left by the lack of religious instruction.

From the very inception of the University of Virginia, Thomas Jefferson was a member of its Board of Visitors, and at the first meeting, which was held on March 29, 1819, was elected Rector, an office which he held until his death in 1826 (Jefferson, *Writings* (Mem. Assn. Ed., 1904), XIX, pp. 373-374, 499). All of the minutes of the meetings of the Board of Visitors were authenticated by Jefferson's signature and most were written in his handwriting (Jefferson, *Writings* (1904), XIX, p. 360).

He was not only the Rector, but he was the architect who designed the buildings, the overseer who saw to their proper erection, and the superintendent of construction who engaged the workmen, bought the bricks, and chose the trees to be felled for timber. (Jefferson, *Writings* (1904), XIX, p. 360). As will be shown by the minutes of the Board of Visitors which follow, Jefferson designed the rotunda of the University so as to include a room for religious worship.

The minutes of the Board of Visitors for October 7, 1822, contain its annual report required by law. Referring to the Commissioners' report to the legislature, made in 1818, which had recommended the establishment of the University, the Visitors' report said (Jefferson, *Writings* (1904), XIX, p. 411):

> "The remaining building, necessary to complete the whole establishment, and called for by the report of 1818, *which was to contain rooms for religious worship*, for public examinations, for a library, and for other associated purposes, is not yet begun for want of funds". [Italics supplied.]

Continuing, the Visitors' report—quite obviously prepared by Jefferson and in all events approved by him—discussed the omission, for constitutional reasons, of a department of divinity, and the methods suggested for filling the "chasm" thus left in the curriculum. Because

of its importance, we quote it at some length, as follows (Jefferson, *Writings* (1904), XIX, pp. 413-416; Padover, *The Complete Jefferson*, pp. 957 *et seq.*):

"In the same report of the commissioners of 1818 it was stated by them that 'in conformity with the principles of constitution, which place all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment or surprise, and with the sentiments of the legislature in freedom of religion, manifested on former occasions, they had not proposed that any professorship of divinity should be established in the University; that provision, however, was made for giving instruction in the Hebrew, Greek and Latin languages, the depositories of the originals, and of the earliest and most respected authorities of the faith of every sect, and for courses of ethical lectures, developing those moral obligations in which all sects agree. That, proceeding thus far, without offence to the constitution, they had left, at this point, to every sect to take into their own hands the office of further instruction in the peculiar tenet of each.'

"It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. But it was thought that this want, and the entrustment to each society of instruction in its own doctrine, were evils of less danger than a permission to the public authorities to dictate modes or principles of religious instruction, or than opportunities furnished by them by giving countenance or ascendancy to any one sect over another. A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity

the full benefit [of] the public provisions made for instruction in the other branches of science. These branches are equally necessary to the divine as to the other professional or civil characters, to enable them to fulfill the duties of their calling with understanding and usefulness. It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the commissioners, or in the lecturing room of such professor.

"To such propositions the Visitors are disposed to lend a willing ear, and would think it their duty to give every encouragement, by assuring to those who might choose such a location for their schools, that the regulations of the University should be so modified and accommodated as to give every facility of access and attendance to their students, with such regulated use also as may be permitted to the other students, of the library which may hereafter be acquired, either by public or private munificence. But always understanding that these schools shall be independent of the University and of each other."

The report of the visitors then declared:

"Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this

state, individually and publicly, have ever manifested the most watchful jealousy: and could this jealousy be now alarmed, in the opinion of the legislature by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express."

That no legislative disapprobation was expressed is proved by the fact that the regulations adopted by the Visitors two years later, on October 4, 1824, made provision for the students of religious schools "should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect". (Jefferson, *Writings* (1904), XIX, p. 449).

The same regulations provided (Jefferson, *Writings*, (1904), XIX, pp. 449-450):

> The upper circular room of the rotunda shall be reserved for a library.
>
> One of its larger elliptical rooms on its middle floor shall be used for annual examinations, for lectures to such schools as are too numerous for their ordinary school-room, *and for religious worship, under the regulations allowed to be prescribed by law.* [Italics supplied.]

That Jefferson fully approved the plan is clearly indicated by a portion of his letter to Dr. Thomas Cooper dated November 2, 1822, an excerpt from which letter has already been quoted (p. 72, above), in which Jefferson wrote:

> "In our university you know there is no Professorship of Divinity. A handle has been made of this, to disseminate an idea that this is an institution, not merely of no religion, but against all religion. Occasion was taken at the last meeting of the Visitors, to bring forward an idea that might silence this calumny, which weighed on the minds of some honest friends to

the institution. In our annual report to the legislature, after stating the constitutional reasons against a public establishment of any religious instruction, we suggest the expediency of encouraging the different religious sects to establish, each for itself, a professorship of their own tenets, on the confines of the university, so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other. This fills the chasm objected to ours, as a defect in an institution professing to give instruction in *all* useful sciences. I think the invitation will be accepted, by some sects from candid intentions, and by others from jealousy and rivalship. And by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason, and morality."

Surely, the approval of what is the plan of voluntary religious education involved in the present case by Thomas Jefferson, author of the Declaration of Independence, author of the Virginia Bill for Establishing Religious Freedom, and no doubt the foremost advocate of the Federal Bill of Rights, is well-nigh conclusive that it does not violate the provisions of the First Amendment.

I-B.

The "establishment of religion" clause of the First Amendment refers to a Nationwide Religion, and is not binding on the several states, particularly if construed to prevent the Type of Local Educational Activity Involved Here.

An assumption that the establishment of religion clause is binding on the states was made in the appellee's brief (p. 28) in *Everson* v. *Bd. of Edu. of Ewing Twp.*, 330 U.S. 1, accompanied by a protest that the point had not been mentioned below. We strongly contend here, accompanied by the same protest, that the clause is not made applicable to the states by the Fourteenth Amendment, because the clause refers to a national establishment of religion and because of other reasons presently stated.

If a transformation is to be made in the historic meaning of the First Amendment, protecting the citizen against being compelled to subscribe to and support articles of faith and a mode of worship, so that the First Amendment becomes simply a weapon in the hands of any small minority to prevent a great experiment for the education of the youth of the land—an experiment which is being conducted at the local level, where it will be carefully watched by those whom it affects—then, we say, no great constitutional principle enforceable on a national scale is involved.

Stripped of the legal reasoning by which the result is sought to be reached, the net result now sought to be accomplished, by applying the Federal constitution to educational matters which have long been considered to be of purely local concern, is that henceforth the Fourteenth Amendment shall be used to supersede the much more specific constitutional inhibitions usually and almost without exception imposed by state constitutions. Of course,

at the time it was passed the Fourteenth Amendment was considered to have no such effect.

During President Grant's administration there was great agitation against public support of sectarian schools. In 1875, President Grant in a message to Congress urged a constitutional amendment forbidding the teaching of religious tenets in any public school and forbidding granting of any public funds for the benefit of any sect or denomination. The Republican party platform of 1876 (par. 7) called for an amendment to forbid the application of any public funds for the benefit of schools or institutions under sectarian control.[1]

This resulted in a House resolution, defeated in the Senate, for an amendment to the Federal constitution to prohibit the states from paying monies to sectarian institutions of all kinds.[2] The vote in the Senate was on strictly

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[1] AMERICAN CHURCH LAW (1933) Carl Zollman, pp. 75-76.

[2] AMERICAN CHURCH LAW (1933) Zollman, p. 76.

Said proposed constitutional amendment was as follows (Congressional Record, 44th Congress, Vol. 4, Pt. 1, p. 5580):

> "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory. District or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the contr of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught; and no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or de-

party lines, all the Republicans voting for, and all the Democrats voting against, the resolution.[3]

Being a campaign issue in the Hayes-Tilden election of 1876, the proposed amendment was drafted by James G. Blaine, a leading Republican, in language to impose a severe restriction on the states.[3] The solidly negative vote of the Democratic party in the Senate defeated the proposal on August 14, 1876 by preventing an affirmative vote of two-thirds of the Senate as required by the Constitution, Art. V. (See page 5595 of the same volume of the Congressional Record cited in footnote 2.) The restraint on the state action thus defeated in a bitter political controversy in 1876, is now sought to be imposed on the states by a judicial decision in the case at bar. The Court is asked now, seventy-five years later, to hold that the Fourteenth Amendment had in 1876 already imposed upon the states—without the necessity of the proposed constitutional amendment which was voted down—every restraint which the new amendment sought to impose!

That the framers of the defeated amendment considered the language of both religious clauses of the First Amendment insufficient and inadequate to prevent the payment of public monies to support religious education is apparent from the language of the proposed amendment which is set forth in footnote 2. This is an additional practical construction, of the establishment of religion clause against an interpretation that it restrains anything in addition to laws favoring one religion over another.

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nomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested.

SEC. 2. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article."

This is set out in AMERICAN CHURCH LAW, *supra*, note 1, p. 76.

[3] AMERICAN CHURCH LAW (1933) Zollman, p. 76.

A large majority of the states now have constitutional provisions, most of them adopted *after* the passage of the Fourteenth Amendment, prohibiting, in varying language, appropriations of state funds for sectarian purposes or to sectarian bodies. (See a list of those adopted after the Fourteenth Amendment in *American Church Law* (1933) Zollman, pp. 78-80; Also found in *"Historical Background of Religious Day Schools"*, by Zollman, Marquette Univ. Law Review, vol. 9, pp. 135-165, April, 1925). There is now no occasion, years after the adoption of the Fourteenth Amendment, for transferring from the states to the Federal Government the enforcement of such local state policy.

It may be asked why the states should complain at similar Federal restriction, implemented by the Fourteenth Amendment, if they already have provisions so specific and so drastic against aid to any secetarian purpose. The answer is a realistic one: that in a matter which concerns so closely the lives of their own people, the states want to retain the power to interpret and enforce their own specific constitutional provisions without constant appeals being made to the Fourteenth Amendment, which in this instance furnishes a rule of decision so vague that its enforcement always threatens to become an ideological matter, instead of a legal one. This desire is in accordance with national policy and national history up to this date.

This Court has held that education, under the Federal Constitution, is a matter of state power and not of Federal power, and is not to be interfered with unless Constitutional rights guaranteed by the Federal Constitution are clearly infringed—*Cumming* v. *Richmond County Bd. of Edu.*, 175 U.S. 528, 545 (1899); *Gong Lum* v. *Rice*, 275 U.S. 78, 85 (1927).

The State of Illinois has treated the matter of education not only as a matter of state concern, but as a matter of peculiarly local concern. The power of self-regulation given to school boards is great.

For example, wide discretion is held to be vested in the local school boards regarding course of study,[4] regulation of textbooks,[5] preventing school teachers from joining labor unions,[6] leasing unused portions of the school building,[7] and dividing the school district into areas for various schools.[8] The opinion in the present case is another example (Tr. 278).

Deep in the American tradition is the rule that courts do not interfere in school affairs except where the violation is clear. The self-governing functions of a board of education and the broad discretion vested in it have been recognized by the Illinois courts from the earliest days. In 1858, *Board of School Inspectors of the City of Peoria* v. *People ex rel. Henry Grove*, 20 Ill. 526, our court held (pp. 531-532):

> "The Board of Inspectors are vested with a large discretion in the performance of their important

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[4] *Powell* v. *Board of Education*, 97 Ill. 375 (1881): Board may add teaching of German to curriculum; a good review of Illinois school legislation to 1881.

[5] *Segar* v. *Board of Education*, 317 Ill. 418, 422, 148 N.E. 289 (1925): Board may require a deposit for issuance of free textbooks.

[6] *People ex rel. Fursman* v. *Chicago*, 278 Ill. 318, 326, 116 N.E. 158 (1917): Board may forbid teachers to join labor union.

[7] *Lagow* v. *Hill*, 238 Ill. 428, 87 N.E. 369 (1909): Board may lease portion of school building to a fraternal organization.

[8] *Board of School Inspectors* v. *People ex rel. Grove*, 20 Ill. 526, 531-532 (1858); *Gustafson* v. *Board of Education*, 319 Ill. App. 255, 49 N.E. 2d 311 (1943): Board may regulate area from which pupils may attend a particular school.

> duties, and the courts will not attempt to control its exercise except in a palpable case, where a plain violation of the law is manifested."

Yet, the state of Illinois as long ago as 1874 held that this discretion of the school boards must be exercised in a lawful manner, and at that early date—long before this Court has even intimated that the Fourteenth Amendment requires any such ruling—the Supreme Court of Illinois prohibited the segregation of Negro school children, even against the claim that equal facilities were being furnished to them—*Chase* v. *Stephenson*, 71 Ill. 383 (1874), holding that Negro children cannot be required to attend a separate school.

The Court stated (p. 385):

> "While the directors, very properly, have large and discretionary powers in regard to the management and control of schools, in order to increase their usefulness, they have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position."

The question involved in the present case is one of educational policy. Every reason which has made this court reluctant to interfere in such cases, except where a clear violation of a Federal right has been shown, still exists. In this day, it is even more urgent that adherence to such a rule be observed, because of the flood of applications—well-founded or not—which will be made to this Court if it ever enters, by the Fourteenth Amendment route, the jurisdiction over matters of such purely local concern. Were this truly a case of religious liberty, no protest could be made of the Court's jurisdiction. This is a different sort of a case. At most it concerns nothing more than (a) the use of public property, without discrimination, for religious education classes, and (b) the right of the appellant to impose her political science views in matters of education on the Champaign Board of Education.

We suggest that no clear violation of any Federal right has been shown by the appellant which justifies a holding that the Fourteenth Amendment has been violated by the action of the school board in this case.

No matter how the Court may interpret the language of the First Amendment, as it is to be applied to the Federal government, which in form it solely controls, the only means of enforcing it against the State of Illinois is by virtue of the Fourteenth Amendment.* No provision has been pointed to in that Amendment which imposes on the State of Illinois an interpretation of the First Amendment which would prevent the use of school buildings, without direct or measurable expense to the school district, for religious education.

It is this Court's nice and high constitutional duty to draw the distinction between those rights provided by the Federal Constitution which are to be applied to the States as fundamental and those which are not to be so applied because not so fundamental. In determining this question the Court has, in the past, liberally resorted to what the Framers considered to be fundamental—i.e., what were included in the term "national rights" as used by the framers and contemporaneous writers and what appeals to the reason as being fundamental and inherent in citizenship. We submit that if the Federal Government imposes upon the States only the requirement that it treat all faiths, religions, sects, and beliefs equally and without discrimination and leaves to the States within the framework of their own constitutions the extent to which non-preferential aid and cooperation of government shall be extended, it will have imposed the only prohibition which need be imposed on the national level.

*_West Virginia State Bd. of Edu._ v. _Barnette_, 319 U.S. 624, 639.

Any other result would not be in accordance with the constitutional doctrine of Federalism referred to in *Adamson* v. *California*, 332 U. S. 46. Concerning the decision in that case that the self-crimination clause of the Fifth Amendment did not bind the States, Mr. Justice Reed, speaking for the Court, said (p. 53):

> "It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship".

There is no occasion at this late date, 160 years after the formation of our Government, for the Supreme Court of the United States to impose, for the first time, more than "equal treatment of religions" upon the States. The problem of the extent to which equal aid shall be extended to religion has always heretofore been handled on the State level and is extensively treated in the constitutional provisions of the several states.

It is a problem which has been satisfactorily handled without the intervention of this Court, and it is difficult to see why the power of this Court should now be asserted. The very fact that its power has never been invoked in the history of our country is, itself, the most persuasive evidence that the power was never intended to be exercised and is not necessary to the preservation of the fundamental rights of citizens whether as citizens of the States or of the United States. *

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* A contemporaneous, uniform, legislative or executive construction of constitutional provisions adopted and acted on with the acquiescence of the people for many years has always been entitled to great weight—*Okanogan Indians* v. *United States*, 279 U.S. 655, 688 (1929); *Hanover Fire Ins. Co.* v. *Harding*, 327 Ill. 590, 603, 158 N.E. 849 (1927) and see cases, p. 60, note.

No contention was made by defendant's counsel in *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, (1947) that the establishment of religion clause of the First Amendment did not apply to the States. That case was, however, the first case in which it was sought (and there unsuccessfully) to apply the establishment of religion clause of the First Amendment to restrain the acts of a State. It seems to have been assumed, rather than decided, that since the freedom of religion clause (*Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943)) and other clauses of the First Amendment had been applied as a protection of individual freedom against state action, the establishment of religion clause was, therefore, equally applicable as a restraint on the states with respect to their relationships with religious groups.

We submit that the correctness of the assumption that the freedom of religion clause is a restraint on State action depends on what meaning is attributed by this Court to such clause. For this reason we have discussed the meaning of the clause first (Point I-A) and we now come to the question whether such clause is a restraint upon state action.

It is, of course, freely recognized by us that the protection of an individual citizen's religious freedom is a thing so fundamental that this Court has very properly held that it was applicable to the States. We are confident, however, that the Court will find that the appellant's *religious freedom* (which because she is an atheist might better be termed "right to freedom of thought") has not been infringed. She conceded from the witness stand that her opposition to the program of voluntary religious classes was not based upon any harm that she feared it would do her son Terry, but was based on her feeling, which she described as bitter, that the classes were undemocratic and violated what she termed "the constitutional principle

of separation of Church and State" (Tr. 192-193), about which the appellant said she felt very deeply (Tr. 201).

Starting with the undoubted proposition that originally the First Amendment applied only to the Federal Government (*Permoli* v. *First Municipality of New Orleans*, 3 How. 589 (1844); *Barron* v. *Baltimore*, 7 Pet. 243 (1833)), the next question is whether the establishment of religion clause has been made applicable to the States.

The fact that the establishment of religion clause is found in the First Amendment, and that other clauses of the First Amendment have been held by this Court to apply to state action because of the passage of the Fourteenth Amendment, does not require that the establishment of religion clause be given like effect, for, as held by the Court in the opinion of Mr. Chief Justice Hughes, in the case of *Home Building and Loan Association* v. *Blaisdell*, 290 U.S. 398 (1934) at p. 427:

> "Even the grouping of subjects in the same clause may not require the same application to each of the subjects, regardless of differences in their nature. See *Groves* v. *Slaughter*, 15 Pet. 449, 505, 10 L. ed. 800, 821; *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434, 76 L. ed. 1204, 1208, 52 S. Ct. 607."

The decisions are clear that the Fourteenth Amendment has not, by a mechanical process, imposed the first eight amendments on the States.

Twining v. *New Jersey*, 211 U.S. 78, 91-98 (1908).

Hamilton v. *Regents of the University of California*, 293 U.S. 245, 261 (1934).

Palko v. *Connecticut*, 302 U.S. 319, 323, 328 (1937).

Betts v. *Brady*, 316 U.S. 455, 461 (1942).

Adamson v. *California*, 332 U.S. 46 (decided June 23, 1947).

Mr. Justice Roberts, speaking for the Court in *Betts* v. *Brady*, 316 U.S. 455 (1941) warned against too rigid and

mechanical an application of the first eight amendments by virtue of the Fourteenth, (p. 46):

> "In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

In view of the very recent discussion in *Adamson* v. *California,* 332 U.S. 46 (decided June 23, 1947), of this general question—involving, there, the self-crimination clause of the Fifth Amendment—the question is fresh in the mind of the Court and we shall attempt to state our position without too much elaboration. Mr. Justice Reed, speaking for the Court in the *Adamson* case, defined "the constitutional doctrine of Federalism" as "leaving to the States the responsibility of dealing with the privileges and immunities of their citizens except those inherent in National citizenship."

In *Palko* v. *Connecticut,* 302 U.S. 319, 329, Mr. Justice Cardozo, speaking for the Court, said that there was imposed on the States every Federal constitutional right "implicit in the concept of ordered liberty."

Since all of the Bill of Rights amendments were restrictions, in form, on Federal power, there was in the drafting of the amendments no occasion to classify them as between (1) those protecting fundamental rights of individuals, (2) those involving mere matters of procedure and (3) those involving a division of political authority between the Federal and State governments, in which last category we believe the establishment of religion clause properly falls.

As emphasizing the fact that the form of the amendments is not controlling, we here note that the House had submitted seventeen proposed amendments to the Senate, and the Senate then combined several of them. Twelve

were finally approved by both Senate and House and proposed to the states. The third and fourth propositions submitted by the House became the third amendment finally proposed, and is now the First Amendment because of the failure of ratification of the first two propositions. (*Third Annual Report,* Archivist of U.S., 1936-1937, photographs of House and Senate drafts, pp. 64-65.) In order to determine the applicability of the provision under consideration, therefore, it is necessary to do more than ascertain its place in the list of amendments. It is necessary to consider its nature.

The essential differences between the "establishment of religion" and the "freedom of religion" clauses have been discussed above (pp. 84, 88) and need not be repeated.

In determining whether the establishment of religion clause is to be applied to the states, we submit the following considerations:

By its very terms, which refer to organized religion rather than to individuals, the establishment of religion clause does not directly involve personal freedoms. That Mr. Madison did not consider the "establishment of religion" clause as protecting any fundamental right appears from the fact that he sought by his initial proposals with reference to amendments to guarantee the "rights of conscience," by "double security" against all governmental action either State or Federal, but *sought only to prevent the Federal Government from operating in the field of "establishment of religion."* (Annals of Congress, I, 434-435.)

Again, the "Rights of Man" did not involve the question of establishment or disestablishment of religion. They did include freedom of conscience, and that right was a minimum one required by all members of society against all governmental action. This was not, however, true in the field of "establishment of religion."

The establishment of religion clause did not codify or express any right uniformly recognized or protected by the States at the time of its adoption. As appears from the constitutional provisions of Massachusetts and South Carolina above (the New Hampshire constitution being similar to that of Massachusetts), several of the states at the time of the adoption of the First Amendment had "an establishment of religion."* One of the undoubted purposes accomplished by the establishment of religion clause was to divide the power in religious matters between the States and the Federal government so as to exclude the Federal government from establishing a national religion.

Madison's original proposal, ("Version No. 1," pp. 38-39, above), referred to "National religion." He came back to the word "National" in the Congressional Debates (pp. 41-42).

Madison's original amendment and his comments in the debates which have been set forth prove that the establishment of religion against which the amendment was directed was a National establishment, and that apparently the only reason that the word "National" was not used was because of the objection of Elbridge Gerry of Massachusetts, and perhaps of others who felt as he did, that the use of the word "National" indicated that the new government was not Federal but National—a matter of hot debate. In no event, however, can it be doubted that the type of establishment of religion referred to was a National one. The same language which prohibited a law establishing a religion prohibited a law disestablishing one. This protected the states both against the establishment of a National religion and interference with their own local state-aided and state-preferred churches.

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*Massachusetts, p. 74; N. H., p. 36; South Carolina, p. 56; see also, AMERICAN CHURCH LAW (1933) Zollman, p. 16.

The clause started out in Congress ("Version No. 1", p. 38, above) as an expression against the establishment of any national religion, and this thought was carried through the subsequent versions (No. 2, p. 39, above; No. 3, p. 42, above, and No. 4, p. 44) until the final one, which introduced for the first time the words "respecting an establishment of religion" (Final version, p. 47, above). The First Amendment prohibited Congressional action either for or against an establishment of religion by using the broad word "respecting". Speaking literally, there is no clause against the establishment of religion in the First Amendment. The specific objective of preventing an established religion for the United States, as a whole, was accomplished by language which made support of the proposed amendment possible both (a) by the people who objected to Congress establishing a national religion and also (b) many people in the various states who wanted the state-favored churches to continue free from Federal interference. A number of such churches continued for years after the adoption of the First Amendment.

Philip Schaff, Professor of Church History in the Union Theological Seminary at New York, has written in this vein. (*Papers of the American Historical Association*, Vol. II, No. 4; G. P. Putnam's Sons, 1888, pp. 23-24):

> "The Framers of the Constitution, therefore, had no right and no intention to interfere with the religion of the citizens of any State, or to discriminate between denominations; their only just and wise course was to leave the subject of religion to the several States, to put all churches on an equal footing before the national law, and to secure to them equal protection. Liberty of all is the best guarantee of the liberty of each."

Various types of institutions under religious auspices (schools, colleges, orphanages, hospitals, etc.), in the sup-

port of which public funds were used at least in part, were common in eighteenth century America.*

The relations of the individual colonies with the mother country had emphasized *the importance of retaining local control* in religious matters. In this respect the establishment of religion clause of the First Amendment is like the Second Amendment, which preserves the right "to bear arms."**

Although expressed in the form of a right reserved "to the people," the Second Amendment was not intended to and has not been given the effect of protecting an individual's right to carry weapons (*United States* v. *Cruikshank*, 92 U.S. 553; *Presser* v. *Illinois*, 116 U.S. 265 *Miller* v. *Texas*, 153 U.S. 535). It gives a *state* the right to maintain a militia.

Both the establishment of religion clause of the First Amendment, and the Second Amendment were concerned with the division of power between the Federal government and the States, yet both of them are couched in the same terms as rights which clearly applied to prohibit governmental action against individuals. Just as the Second Amendment has been interpreted only to preserve States' rights, so should the establishment of religion clause of the First Amendment be similarly limited in operation. The problem existing at the time of the passage of the First Amendment was not one of disestablishing a National religion already existing but to prevent the establishment of

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*See Howard K. Beale, *A History of Freedom of Teaching in American Schools*: Report of the Commission on Social Studies, American Historical Association, (New York: Scribner's Sons, 1941), Chapters I-IV, inc.

** The Second Amendment provides:

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

one. The question whether a State should have an establishment of religion was wisely left to each State. There is evidence in Madison's letter (p. 49, above) of the opposition in New England to the original constitution because of its omission of religious tests. Any attempt on the part of the Federal Government to interfere with the laws of the States dealing with religious matters would have aroused bitter resentment and resistance. We submit that the establishment of religion clause comes within that class of amendments having a meaning peculiar to the Federal Government; that at the time of its adoption it referred to the subject matter of "an establishment of religion" in a National sense only, and that such inherent meaning has not changed, so that the clause is still limited to the Federal government. Viewed from the standpoint of a citizen, his right of National citizenship is a right to be free of any "establishment of religion" on a National scale. Of course, he also is protected against any State action which invades his religious liberty, whether it be in the form of establishing a state church or not and, of course, is also protected by the due process clause of the Fourteenth Amendment.

Looking to the Fourteenth Amendment for the decision of this particular question, it is our position that the actions of the Champaign School Board do not in violation of that amendment, "abridge the privileges or immunities" of the appellant here; nor deprive the appellant "of life, liberty or property without due process of law" nor deny to the appellant "the equal protection of the laws".

We now turn to the question of whether the appellant's rights of religious freedom—as distinguished from her pocketbook and her theories of relationship between Church and State—have been violated by the acts of the school board.

II.

The Freedom of Religion Clause of the First Amendment Does Not Prohibit the Use of School Buildings for Religious Education.

We have previously indicated that the appellant has not clearly nor conventionally expressed in her "Errors Relied Upon" any claim of violation of her religious freedom, nor do we find in her argument thereof any clear and unambiguous expression of any right or rights which are claimed to have been invaded.

This makes it difficult to delineate the issue between us. We have therefore restated the constitutional question with reference to religious freedom in the broadest possible manner which might be supposed to have been intended to be raised by the appellant. This we have set forth on page 4 of our brief as:

> "*Second.* Does the voluntary Champaign plan of religious education violate the freedom of religion clause of the First Amendment?"

Subject to our jurisdictional objection previously set up, that appellant has no standing in this Court to object to a violation of her son's supposed Constitutional rights, we will discuss this second question to the extent argued by the appellant and raised by the evidence in the record.

It must be pointed out again that "the voluntary Champaign plan of religious education" is not the plan of the defendant school board, but is the plan alone of the voluntarily co-operating religious groups which have sought, obtained, and acted upon the permission of the Board of Education. It is, therefore, not "the plan" which is the subject of examination here, or which is to be reviewed by this Court, but it is the action of the Board of Education

in permitting the use of school property by the participants in "the plan". To be more specific, "the plan" of the participating voluntary groups might include less than all religious sects or denominations, or hypothetically might actually exclude some (though there is nothing in the evidence in this case to support the latter supposition), but this would not condemn the act of the Board of Education in permitting the use of school property or raise any constitutional question regarding the acts of the Board, so long as the Board stands ready at all times to permit the additional free and equal use of the school buildings, without discrimination, by all other groups and has not denied its use to any (which is the case here). (Tr. 118-120, 159-160.)

This discussion appellant introduces in her brief by recognition of the widespread practices of Bible reading and opening exercises of a religious nature in the public schools (Appellant's brief, p. 15). The Court is there referred to Bureau of Education Bulletin 1923, No. 15. We suggest to the Court that a more recent, relevant and authoritative fund of data will be found in Bulletin, 1941, No. 3 of the U. S. Office of Education and the Federal Security Agency, entitled WEEKDAY CLASSES IN RELIGIOUS EDUCATION. At page 10 of this bulletin the following information is given:

> "In approximately three-fourths of the States the laws permit or require the reading of the Bible at some appropriate time during the school program: 12 States require Bible reading, in 6 more States the law specifically permits Bible reading, and in 18 additional States permission for Bible reading is implied in the general terms of the law".

This bulletin (p. 14) lists 38 states in which children are released from the public school system for the purpose of taking religious education, and says that 488 school systems reported this practice, but these data are neither

exhaustive as of that date, 1941, nor abreast with current statistics, which it is unauthoritatively estimated would indicate there are many more participating communities.

The bulletin to which we refer is valuable, too, for its reference (p. 1) to the "1940 White House Conference on Children in a Democracy", which includes the following:

> "Despite the various efforts made by church groups to educate children in religion, the religious needs of many children are imperfectly met at the present time. It has been estimated that approximately one-half of the children and youth in the United States receive no religious instruction outside the home."

The bulletin, at page 2, also attributes recognition on the part of educators of the belief that a man "is educated only when he understands and appreciates the spiritual and ethical principles which constitute a central part of the heritage of the race."

The problem of ascertaining and delineating the constitutionally protected rights of the appellant must necessarily be undertaken with full recognition of certain fundamental premises upon which American democracy is built. These have been frequently recognized by judicial decisions and are a part of our law as well as of our beliefs as a people.

First, we are not a Godless or irreligious people but have a deeply grounded sense of spiritual values held alike as individuals, in and out of organized churches.[1]

Second, we recognize that children are not mere wards of the state but that their parents have the first respon-

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[1] *Mormon Church* v. *United States*, 136 U.S. 1 (1890); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 465, 470 (1892); *Wilkerson* v. *City of Rome*, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334 (1922).

sibility and correlative right to control their education and moral and physical development and well-being.[2]

Third, we believe in the widest possible freedom in developing, maintaining, and expressing ideas in every realm of human thought; equally abhorring every attempt to standardize, or mold into a rigid pattern, thought in any field to which the human mind may turn.[3]

Pointed application of these premises has been made to the field of education by our courts wherever the problem has arisen.

It is a matter of pride with the Bar of Illinois that the Supreme Court of this State was among the very earliest courts to give judicial recognition to the principle that free, public education did not carry with it the concept that the child was a creature of the state, and no longer subject to parental guidance, tuition and control. As early as 1877 that Court, in *Trustees of Schools* v. *People ex rel. Van Allen*, 87 Ill. 303, in discussing the right of the parent to control the education of his child, said (p. 308):

> "But no attempt has hitherto been made in this State to deny, by law, all the control by the parent over the education of his child. Upon the contrary, the policy of our law has ever been to recognize the right of the parent to determine to what extent his child shall be educated, during minority—presuming that his natural affections and superior opportunities of knowing the physical and mental capabilities and future prospects of his child, will insure the adoption of that course which will most effectually promote the child's welfare. The policy of the school law is only to withdraw from the parent the right to select the branches to be studied by the child, to the extent that the exercise of that right would interfere with the system of instruction prescribed for the school, and its efficiency

[2] *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925).

[3] See *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943).

in imparting education to all entitled to share in its benefits. No particular branch of study is compulsory upon those who attend school, but schools are simply provided by the public in which prescribed branches are taught, which are free to all within the district between certain ages. In most primary schools it would be both absurd and impracticable to require every pupil to pursue the same study at the same time. Discrimination and preference between different branches of study, until some degree of advancement is attained, is inevitable—and, afterwards, a due regard for the interests of the child will always require it, in greater or less degree."

Again the Illinois Supreme Court said at page 309:

"It is possible that a father may have very satisfactory reasons for having his son perfected in certain branches of education to the entire exclusion of others; and so long as, in exercising his parental authority in making the selection of the branches he shall pursue, none others are affected, it can be of no practical concern to those having the public schools in charge".

This Court gave recognition to the same parental right in a case in which it was held that the interest of the parent in the education of his children was so high that it transcended the right of the state to impose a uniform culture, even in a field that the state thought important to the safeguarding of its political institutions. In this case, *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) the Court held unconstitutional, under the Fourteenth Amendment, a statute forbidding the teaching of the German language.

In the course of its decision, the Court said (p. 400):

"The American people have always regarded education and acquisition of knowledge as matters of supreme importance, which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws."

Again at pages 401-402 the Court said:

"For the welfare of his Ideal Commonwealth, Plato suggested a law which should provide: 'That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child nor any child his parent . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be.' In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.

'The desire of the legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experience during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquility has been shown."

This was followed and further extended in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) where the Court held

unconstitutional a law of the State of Oregon, the purpose of which was to require all able-bodied children in the state to attend the public schools with the effect of abolishing private and parochial schools. This Court clearly and succinctly expressed the right of the parent to control the education of his child in the following language (p. 535):

> "As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

The Court has thus held unconstitutional any interference with the right of parents wholly to withdraw their children from the public school system and to educate them at private or parochial schools. This, the Court has done in recognition of the right of the parent to control and vary the culture of his child in the matter of religion, as well as in other educational fields. Basically, what is involved in the instant case is the right of parents, not possessing the financial means to send their children to private or parochial schools, to exercise a much more limited right in furtherance of their children's welfare and religious culture. The greater right exists to withdraw children wholly from the public school system for education in private or parochial schools. The lesser right is to direct the children's release for a short period each week. It would seem clear beyond argument that since parents have the greater right, they also have the lesser; provided, al-

ways, of course, that similar rights of other children than their own are not thereby curtailed.

It is to be noted that while this Court was asked to and did throw the full weight of its constitutional authority behind the right of the parent wholly to withdraw his child from the public school system, all that is sought here by the appellee is that the Court permit the exercise of a similar but lesser right. While it was necessary for this Court to hold the action of the state unconstitutional to protect the greater right, it will only be necessary to abstain from interfering with state action to preserve the lesser one in the instant case.

It may be argued that the parents of children participating in weekday released-time religious education courses may exercise the same right wholly to withdraw their children from the public school system as is exercised by the parents of parochial school children. But this flies in the face of the many decisions of this Court that constitutional rights need not be purchased and that they do not depend upon the financial resources of the individual who asserts them. In the words of Mr. Justice Douglas in *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943) at page 111, "freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way".

This case, like many cases that come before this Court, involves the conflicting claims of citizens to their respective rights. In passing upon them, the Court, while properly concerned about the rights of minorities must still—since this is a democracy—consider equally the rights of majorities.

Here a decision adverse to the appellees will directly

affect about eight hundred and fifty children presently taking the courses in Champaign and, indirectly, perhaps two million others throughout the nation. The Champaign children, at least, will have to stop attending classes that they wish to attend. Such a decision will also affect the one child, James Terry McCollum, whose parent is objecting. The effect on Terry, however, will not be to alter Terry's educational program, for he and others whose parents feel as appellant does are not now attending the classes. Stopping classes for 850 children seems too great a price to pay to vindicate a theory of political science held by appellant since college days (Tr. 193, 201).

Rights of parents to exercise a dominant voice in the education of their children, already recognized by this court in the *Pierce* v. *Society of Sisters* and *Meyer* v. *Nebraska* cases, are said by appellant to be in conflict with the right of an irreligious or unreligious taxpayer to be free of the infinitesimal and unmeasurable expense claimed, but not proved, to be involved in the use of school buildings for religious education. Similarly the rights of religiously inclined children, as citizens, to study religious education are said by appellant to be in conflict with the right of a child to be free from the "embarrassment" of a separation from his classmates which occurs as a result of his classmates freely electing to attend the religious education classes.

These are the rights which are invoked by the positions of appellee and appellant, respectively, and no amount of nimbleness with language or characterization by weighted or colored words will alter them.

In deciding these conflicting claimed rights, it will at once appear that the rights of Mr. and Mrs. Bash, the intervenors, as parents of the child Wanda Bash, to see that she is afforded an opportunity to receive religious

education is correlative to the claim of the appellant that her son shall not receive religious education. It will also quickly appear that this right of the former has been exercised without any denial or impairment of the corresponding right of the latter. Similarly the right of the child, Wanda I. Bash, to the free and equal use of school buildings in taking such courses has been exercised without more, at the very most, than the intangible and insubstantial embarrassment of the feelings of James Terry McCollum which is said to result from his being the only one of his class who did not take the religious education work during one semester. His substantial correlative right to remain free not to take religious education or if he wished to use the school building to study atheism has been wholly unimpaired.

In this process of weighing the competing rights of the appellant and the intervening appellees, the language of this Court, speaking by Mr. Justice Douglas, in *Murdock v. Pennsylvania, supra,* is to be taken into account:

> "* * * the rights with which we are dealing are not absolutes."

In every case involving a claim that rights of personal freedom protected by the Constitution have been invaded the Court is required to make a delicate decision. This problem is intensified and complicated when competing rights of different individuals are involved as is the situation here. In the determination of these rights, it is not suggested that the rights of the minority are not to be given the highest protection, but it is suggested that where substantial rights of the majority are also directly involved, the importance of the rights of one is no greater that the importance of the rights of the other. Neither is the fact that a particular applicant for relief is in the minority any evidence in and of itself that his rights have been invaded.

The attack of the appellant upon the program, as it operates in Champaign, is focused, so far as it is based upon an appeal to the "freedom of religion" clause of the First Amendment, upon "an instruction in the school building and during school hours which will segregate the various religious and non-religious groups in the public school" (appellant's brief, page 19), upon the supposed embarrassment which results to those pupils not participating in the program and, lastly, upon the further supposed "friction" which it is said will result from the holding of religious education classes in the school building.

Oddly enough, the appellant's attempts to substantiate these charges of "segregation", "embarrassment", and "friction" are supported, not by a reliance on the record made in the trial court in this case, but by reference to dicta from the decision of the Supreme Court of Illinois in another case decided thirty-seven years ago, *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 92 N.E. 251 (1910) and by reference to a number of similar cases not even from Illinois, but from other states, (appellant's brief, pp. 26-27).

These cases, all or most of them decided before week-day released time programs were inaugurated, and, of course, in no way involving any such practice, condemn as unconstitutional the conduct of religious worship *as an integral part of the compulsory public school program.* These cases involved religious services, usually part of the opening exercises, typically including singing of hymns, repetition of prayers and reading of the Bible. The complainants in each of these cases objected because the complainants were either required to participate therein or to make application *to be excused* from a service which they found offensive either because the version of the Bible used or the nature of the religious services violated

their religious beliefs. At least so far as these cases prohibit the reading of the Bible, they are in the minority,* and, at any rate, have no application to the release of children from the school program for the voluntary study of religious education inside or outside of the public school buildings, under teachers supplied at the expense of and under the control of others.

In order to prove that her constitutional rights have been violated, the appellant also refers (brief, p. 28) to purely hypothetical situations and to a document called *Race Relations in Chicago,* which obviously does not involve or refer to any facts existent in the City of Champaign, as is admitted by appellant herself.

Appellant's unwillingness to rely on the evidence in this case for support of her claim that her rights of religious freedom have been invaded, is, of course, occasioned by the fact that the testimony taken at the trial was overwhelmingly against her. She makes only two transcript references to prove "embarrassment" to her son—transcript 175 and 193.

The first of these (Tr. 175) contains testimony of the appellant's child, James Terry McCollum. After referring to the single occasion when he was placed, during a religious education class, in the hall instead of in the music room, as was an otherwise uniform practice, he testified, "When I was out there on that occasion the kids that went by teased me". There is nothing whatever in the context or elsewhere to indicate that this teasing was about his religious views, his non-participation in the religious education class, or anything connected with either one. A more revealing statement, and one indicating that he had actually no feeling of embarrassment because of his re-

* American Church Law (1933) Carl Zollman, secs. 81-82, pp. 93-95.

ligious differences from his fellows, is contained in his testimony that "I make no secret among my playmates and acquaintances that I am an atheist" (Tr. 184).

The record is replete with his references to his having volunteered to fellow boy scouts, neighborhood playmates, and schoolmates his atheistic beliefs, and, in fact, the testimony indicates that like his mother he feels that his unbelief in religious is a gratifying mark of distinction (Tr. 183-186). An instance of such attitude is contained in his testimony:

> "I have felt no sense of shame about being an atheist. I sort of enjoyed being different from other people with reference to the matter of God. I am rather proud of the position in which I am put by not believing in a God. In a way it is sort of fun to be an atheist; in a way it is not" (Tr. 184-185).

With reference to this question of whether or not he was actually subjected to embarrassment, the trial court's opinion contained the following specific finding of fact (Tr., 68):

> "Without reviewing all the evidence the court believes the great preponderance of the evidence shows that James Terry McCollum was not subjected to any humiliation, ridicule, ostracism or embarrassment because of his religious opinions, but that his difficulties were due to his own personality problems, entirely disconnected from any question of religion".

Appellant's second transcript reference to support her contention that the program in actual operation caused her son "embarrassment" is even less valuable for her purpose. A full quotation follows (Tr. 193):

> "I asked her [Mrs. Taylor, Terry's teacher] if Terry had to wait in the hall that day and she said he did during the religious education class; that he was provided with a desk and there was sufficient light, and he had books and material to work with.

> She said that she was not aware that there had been any feelings on Terry's part. I told her he had come home crying, very much upset, and had said that he sat in the hallway and that children going through the hallway and seeing him there had assumed he was there for punishment, since occasionally if a child does not conform he is seated in the hallway, *and that was the assumption upon which the children had ridiculed or teased him.* He was very much upset. She said she was sorry, that ordinarily Terry had been allowed to sit in the music room." (Italics supplied)

This leaves appellant entirely dependent for proof of embarrassment to her son from the operation of the religious education classes to reports of other cases—the Illinois *Ring* case and similar cases from other states mentioned in her brief.

That the embarrassment referred to in those cases does not exist in the instant case, is specifically found by the Supreme Court of Illinois in the decision from which this appeal is taken. In that opinion, the court below, after referring to the discussion of embarrassment in the *Ring* case [245 Ill. 334, 92 N.E. 251, (1910)], says (Tr. 274):

> "That appellant's son was so subjected is refuted by appellant's own testimony wherein she testified, 'As for religious education in the public schools, it would not have a bad effect upon Terry [meaning her son] I do not know it would bother him one way or the other. I did not know it until in court.' "

This brings us to a discussion of the appellant's claim that an unlawful "segregation" of pupils is occasioned by the fact that some pupils take religious education and some do not and that this violates her rights under the freedom of religion clause of the First Amendment.

On this issue we suggest to the Court that there is nothing whatever in the record to show "segregation". This is simply a gratuitous and unfounded coloring of facts by the use of a "weighted" word.

What the record actually shows is that as a result of the free exercise of a privilege granted to all pupils in the school system, some elect to take religious education and some do not. This separates pupils, one from the other, for 30 or 45 minutes each week in the same way, and no other, as occurs when some elect to take music and some elect not to take music. There is no evidence whatever that this voluntary system does "segregate" children into religious and non-religious groups. One student in five in the grade schools and four students out of five in the junior high schools did not take religious education (Tr. 258). Numerous students who did not take religious education testified that they did not feel the slightest coercion to participate in the course or embarrassment at not participating. Those who do not participate are motivated by many reasons. Many such students are church members. Some are not. (Tr. 243, 245, 246, 247, 248, 250, 251, 252, 253, 254, 259, 262, 263, 264) Some do not attend because there are other subjects which appeal to them more. Some get all the knowledge of religion which they wish from other sources. Some are too interested in or behind in, their regular subjects to spare the time. One, namely, James Terry McCollum is an atheist and his mother desires to avoid exposing him to the courses either because of his atheism or, perhaps more accurately, only because of her views that the classes violate her firmly-held political view of absolute "separation of church and state."

Thus, pupils who do not enroll in the courses fall into a conglomerate mass. Failure to participate stamps no one an atheist, discloses no religious scruples, assigns no reason. Only those who elect to participate disclose anything regarding their religious affiliations or beliefs, and this is only because they choose to do so and is in a

manner which even the most avid secularist could not call offensive.

It is impossible to determine whether the claim of "embarrassment" to and "segregation" of the appellant's son is that it results from the existence of the released time plan or from the presence of the classes in the school building. It is probable that if the classes were not held in the school building, she would still object to the released time plan, because on page 25 of her brief, after having relied on the repeated claim that the use of school buildings involves an expenditure of public moneys, appellant makes the seemingly inconsistent and self-contradictory statement that "as a matter of fact it is not the use of public school buildings and of public school teachers which violates the constitution; it is the maintenance of instruction by religious groups in the public schools through the use of the resources of such schools".

If the above excerpt indicates that her claim is that there is "an unconstitutional social pressure" (as we might phrase it) on her son by reason of the mere existence of the released time program—whether or not classes are held in the building—then an answer is that every court wherein such a contention has been made has overruled it.

It was raised in the briefs in *People ex rel. Latimer* v. *Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946) and overruled. It was raised in the instant cases and overruled in the following language (Tr. 274):

> "The *Ring* case [245 Ill. 334, 92 N.E. 251] is cited in support of the proposition that the exclusion of a pupil from this part of the school exercises puts him in a class by himself and subjects him to a stigma. We hardly see the difference in this respect as to the situation in the *Latimer* case, above referred to, where groups were excused for one hour each week during the regular school period for the

> purpose of attending religious education classes at places outside of the school property and thereafter returned to the public-school room. The same might be said there that those remaining were subjected to a stigma. That appellant's son was so subjected is refuted by appellant's own testimony * * * " [continuing as previously quoted].

The same possibility of embarrassment and segregation was involved in *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927) which sustained a plan of released-time not involving the use of school building, which use is expressly prohibited by the New York constitution.

The claim that a released-time plan (not involving the use of school buildings, but equally vulnerable to the charge of "embarrassment" and "segregation" as a plan which uses the school buildings) was unconstitutional was recently denied in the case of *Gordon* v. *Bd. of Edu. of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488 (1947), review denied by the California Supreme Court. The *Gordon* case cited the case at bar with approval. It also quoted with approval the following language from *People ex rel. Lewis* v. *Graves*, 219 App. Div. 233, 219 N.Y. Supp. 189, 196, the intermediate appellate decision of *People ex rel. Lewis* v. *Graves*, previously mentioned:

> "The State by its educational policy seeks to build from its youth useful citizens of intelligence and character, not merely pendants and philosophers. In following this policy it should not only consider the wishes, but invite the aid, of parents. When the wish of parents for weekday religious instruction for their children involves no serious interruption to school attendance, the state can have no purpose to defeat it. If local school authorities render their assistance by methods so innocuous as those detailed here, it does not amount to illegality. Reasonableness in the method adopted is the test of such legality. Neither the local school officers nor the commissioner of education have here violated that rule."

The California court further said in its opinion (178 P. 2d 488),

> "They [framers of California constitution] proposed to insure separation of church and state, and to provide that the power and authority of the state should never be devoted to the advancement of any particular sect or denomination. Our pioneer forefathers did not have the remotest idea that they were laying the foundations of the great Commonwealth of California that was to be as a jejune, godless state; they believed one of the great pillars of our national strength to be the general acceptance of religion by our people."

None of these courts has found anything whatever in the actual operation of similar programs to justify a holding that "segregation" or "embarrassment" is caused to individual students or if so caused such "segregation" or "embarrassment" constitute any impairment of constitutionally protected rights of religious freedom. At most, the result is the social consequence of the exercise of an individual right.

If either the relator or her son has felt anything which they interpreted as coercion or embarrassment, it must have come from their hostility to religion, which they proclaimed from the housetops (Tr. 1-2, 205, 182-186). It was not the result of the presence of the religious education classes in the school building, but must have been because they chose to make a parade and display of their atheism. The law cannot protect people against the social consequences of their atheism. What it can and does protect against is discrimination by the law and the government. When that duty is fulfilled, the social consequences of pursuing a course belong just as certainly to the individual as does the right in the first instance to make a choice between atheism and religion.

The unsoundness of the position of the appellant in con-

tending that the presence of these courses in the public school building is a violation of her own and her son's religious liberty, which she says arises from the fact that religious differences are thus pointed out and embarrassment results, is demonstrated by the ridiculous conclusion to which this line of argument leads. There are many other activities in connection with the operation of a public school, always recognized as proper, which much more pointedly underline and mark religious differences.

For instance, it is the almost universal practice to inculcate respect for our national ideals and our flag by flag exercises and by the singing of "The Star Spangled Banner," "America," and "God Bless America." This Court has held that persons such as Jehovah's Witnesses having religious objections to saluting the flag must be excused from such exercise: *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

Giving approval to the claim of appellant that religious instruction given to other children than her own is a violation of her own child's religious freedom would require a rewriting of that decision. As it now stands, it holds only that school children cannot be compelled against their will to salute the American flag and recite an oath of allegiance to the Nation. This is simply the same principle enunciated in the *Ring* case (245 Ill. 334, 92 N.E. 251). Opposing counsel would now extend the holding of the *Barnette* case so as not only to require that objecting children must be excused from the flag salute exercise, but that the exercise itself must be removed from the school to prevent those not participating from having their religious differences noted and being exposed to "segregation" and "embarrassment."

Are we to cease permitting, and in fact encouraging, the singing of the national anthem and "America" and "God Bless America" in our schools because children

of atheists will wish to be excused from joining in, due to the fact that these songs recognize the existence of God and attribute to Him the blessings which we enjoy? If we do not ban these songs from the school, the appellant's child and others like him will, according to this reasoning, have their religious differences noted and will be subjected to "segregation" and "embarrassment."

Even the school cafeteria, an institution almost inseparably tied up with our modern educational system, must be eliminated for similar reasons because the orthodox Jew must refuse pork and the Catholic must frequently, on Fridays and days of abstinence, refuse all meat. The question arises, must we eliminate either the cafeteria, or meat from the menu, to avoid putting children of Jewish and Catholic religious beliefs to the possible "embarrassment" of disclosing their religious affiliations by declining meat?

In these analogies which we suggest for the Court's consideration, the failure to participate is almost always, if not wholly, upon religious grounds. At any rate, it is much more often upon religious grounds than is non-participation in the religious education courses involved here. And yet, even the appellant will not be willing to go as far with these analogies as the inexorable consequences of her arguments naturally and certainly lead her.

Notwithstanding, appellant's claim of religious freedom for herself and vicariously for her son, there runs through her argument a curious thread of hostility to the exercise of similar rights by others. She is particularly disturbed at the prospect of religious freedom for the sect, Jehovah's Witnesses. At page 27 of her brief she refers in an uncomplimentary way to their practices in what is an apparent attempt to create a religious prejudice in the mind of this Court, and having assumed her success in that regard, to appeal to such prejudice in

order to prevent the continuation of the voluntary plan of religious education now in effect.

We do not believe that this Court will restrict the religious freedom of people generally, exemplified by this voluntary system of religious education, because of any distaste which appellant may have for the religious practices of any particular group. The very cases cited by appellant place beyond the pale of judicial decision any such consideration, as does *City of Blue Island* v. *Kozul*, 379 Ill. 511, 41 N.E. 2d 515 (1942), in which the Supreme Court of Illinois has shown an equal anxiety with this Court to protect the rights of religious minorities.

Not content with her references to the Jehovah's Witnesses, the appellant, throughout her brief, attempts to touch every discordant note of religious intolerance—not deigning to omit reference to anti-semitism. If it be a fact that religious strife is a pressing issue in this country, which may well be doubted, one of the remedies is the teaching of religious tolerance and of mutual respect for the religious views of others, which is the cornerstone of the program under attack (Tr. 102, 142-143, 156, 157, 159-160, 227) and the proven result of its operations (Tr. 159, 153, 230-231).

As appellant's argument develops, a similar unwillingness to confine her complaints to the facts in evidence, leads her to deplore "friction" which *will* result from the plan. None is pointed to in Champaign, but it is said that it may occur in the future. She fears different groups in other parts of the State may gain dominance or seek similar cooperation from the school authorities. As pointed out above, inculcating mutual respect for and tolerance of others' opinions is a cornerstone of the program. Adherents of the Catholic, Jewish, and Protestant faiths have and do cooperate, there and elsewhere. "Friction" has not resulted in Champaign. If it were to develop, com-

mon sense would operate to remove the errors of administration which caused it, or, if irremediable, to terminate the program. As an ultimate resort for the remedy of abuses, this Court is always here.

This seems to be a good place to point out again that there is a distinction to be observed in studying appellant's arguments, between the acts of the school board, which are here being reviewed, and any errors, real or imaginary, which may be found in the manner in which the Champaign Religious Education Council may carry out their own plan.

This constant reference on the part of the appellant to the hypothetical and imaginary, displays an overwhelming temptation on her part to condemn, not what has lawfully been done, but what may unlawfully be done at some future time.

Of course, even a statute of general application is not unconstitutional merely because something wrongful may be done under pretense or color of it. The rule in *Montana Co.* v. *St. Louis Mining Co.*, 152 U. S. 160 (1894), quoted from *Stuart* v. *Palmer*, 74 N.Y. 183, 188, which stated that "the constitutional validity of law is to be tested, not by what has been done under it, but what may be, by its authority, be done," was accurately modified in this Court's opinion as follows (p. 170):

> "This test is accurate, provided, of course, it is limited to what may rightfully be done, and does not extend to that which is wrongfully, though under pretense of the statute, done."

Applying this rule, we point out that since what is done in Champaign is constitutional and lawful, what may imagined *will* be done improperly, elsewhere, at a later date under a pretense that it is justified by the decision of the present case should not control this decision to our detriment. This, we submit, is hornbook law.

In 11 Am. Jur. 754, "Constitutional Law," Sec. 111, it is said:

> "One cannot invoke, in order to defeat a law, an apprehension of what might be done under it and which, if done, might not receive judicial approval; to complain of a ruling one must be the victim of it."

Here, the appellant does not seek to invalidate a law of general application, but attacks the validity of specific conduct of the school board by seeking to show that at other times and places and under different conditions, conduct of a somewhat similar nature would be unconstitutional. The question before the Court now is whether on the facts in this record there has been a violation of Federal constitutional rights; not whether on some other occasion, at some other place, other acts of other persons will violate the constitutional provisions sought to be invoked in this case.

That this case is to be decided, not upon imaginary circumstances or supposititious problems which may arise from the decision of this case, but upon a consideration of the actual record involved, will be apparent to your Honors, as it was to the appellate judges who decided *People ex rel. Lewis* v. *Graves,* 219 App. Div. 233, 219 N. Y. Supp. 189 (aff'd 245 N.Y. 195, 156 N.E. 663 [1927]) where they said (219 N. Y. Supp. 189, 193):

> "The Constitution is designed for practical purposes and deals with realities, not fictions or conditions largely imaginary. It is intended to operate benignly in the interest of the governed. It should receive a broad, not a petty, construction."

The truth is that appellant's claim that her religious freedom has been invaded is so ephemeral and unsubstantial as to indicate that it is based not upon any real harm that has either been worked or is feared by her, but rather upon her zealous adherence to the political prin-

ciple of "separation of church and state" which she interprets to forbid this cooperation between the Champaign Council of Religious Education and the defendant Board of Education. This will be apparent from the following excerpt from her testimony at the trial (Tr. 192 and 193):

> *"It was not that I feared that anything taught in those classes would be harmful to Terry,* but that I was bitterly opposed to the whole system as being undemocratic. *To my way of thinking it defeated the constitutional principle of the separation of church and state.* I thought I was being a hypocrite if I allowed him to join in when I opposed it bitterly, merely for the purpose of having him conform to the rest of the children. *I did not think the teaching would harm him or make much difference either way. My concern was that it was a means for the breaking down of the separation of church and state.* I realized in taking this stand against religious education classes participation it was doing Terry harm, making it hard for him. I felt that in the long run it was the only action that I myself could take." (Italics supplied.)

On cross-examination, she stated (Tr. 201):

> "My belief in the doctrine of the separation of church and state is one about which I feel very deeply. It does not influence my attitude towards religious education and religious education in the public schools as it is conducted in School District No. 71. If the court decides that this is definitely within the boundaries of the constitutional limitations, definitely constitutional, I have no further objections".

From this language appears also the other obvious weakness in her appeal to this Court. She makes no pretense or contention whatever that her own rights of religious freedom have been invaded or indeed touched in any way. Rather, all of the evidence which she offered on this issue was with reference to her son Terry. But that this does not raise a justiciable question for decision by this Court we have already pointed out in our discussion of jurisdiction.

It must not be forgotten that the program of religious education, here under attack, is not an isolated instance of the exercise of religious rights by religious people or a deliberate exercise of their rights for the purpose of testing the limits of this Court's patience. The program is rather the spontaneous and widespread reaction of the American people to the secularism which has progressively encroached upon our educational system until educators, as well as religious leaders, are shocked and frightened by the consequences.*

Materialism has on every hand crowded out spiritual values. Crime and juvenile delinquency have grown and the problem remains unsolved. Divorce has increased alarmingly and no solution has been found.

The plain fact is that many sincere persons believe that we must find some method, within our constitutional framework and our democratic processes, with which to combat secularism and materialism and to instill in young minds some perception of the essentiality and worthwhileness of spiritual values, the relative importance of religion in life, alongside of other fields of human thought, activity and expression, such as music, art, the sciences, athletics and vocational training.

Nor is it any answer, but more nearly is it an intended sarcasm, to say that the place for this moral and religious

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*American Church Law (1933), Carl Zollmann, p. 82, sec. 69:

"The consequences of a godless education can be studied today at close hand in any penitentiary, house of correction, or reform school. They are vitally felt by every teacher from the kindergarten to the University and by every business man from the corner grocer to the president of the most powerful bank. They fill the courts with litigation, the jails with inmates, and the cemeteries with corpses."

training, is in the home or in the church. Just what is meant by this is not clear, but if it is an appeal to history, it proves nothing at all. All of the functions now performed in the school were once performed, to the extent that they were performed at all, in the home, the church and the church school. In society at a more primitive stage all were performed in the home.

With the acceptance of the responsibility for free public education by government, which acceptance was not made until after our Constitution was written, one after another of these fields has been pre-empted in part or in toto by the school. In the process, religion which was once a part of every school curriculum, has been crowded out more and more until only thirty-six states retain any vestige of it and they principally by an opening exercise of brief Bible reading and singing of hymns. [It is to be noted that if appellant's views are accepted by the Court, even this gesture of recognition of religion would be prohibited.]

Every subject in the curriculum having once been taught in the home, and having been taken over by the school, it might be said with equal validity that the place for teaching vocational training or music, or athletics is in the home. If the statement that the place for religious instruction is in the home is not an appeal to history, what is it? Does it suggest that parents possess special ability as teachers of religion? No one ever suggested that this was true in any other field—so why religion? Is it not reasonable to suppose that parents, who want their children to know more about religion than they themselves do, will welcome the opportunity for them to study it out of the home, as readily as they welcome the similar opportunity for their children to study algebra, or music, or sex, and for the same reason?

As to the function of churches in religious education, they do, of course, have a very great responsibility. What is this function? It is primarily the furnishing of qualified teachers with the necessary religious background and in the instant case they are fully performing this function. It is the place of the teaching that is in question. Why is the church such a peculiarly good place? It might as fittingly be argued that the place to study civics is the Legislature, music in the recital hall, vocational training in the factory, hygiene in the hospital, ad infinitum. The real truth is that all are taught in the school for practical considerations of safety, convenience and efficiency.

The courts have uniformly upheld the right of school authorities to release children from the school program for limited periods for study of religious education.*

This right is apparently not questioned here by the appellant in any way. What is questioned and all that is challenged is the place. What gives this objection to place any right to be heard when it is religion that is being considered instead of music or dancing or woodworking? Do not the same considerations of safety, efficiency and convenience apply to the one as to the other? It is conceded that the parents have the right to request, the school board to permit, and the children to participate, in religious education classes. Why, then is not the school building, where the children are at the time of their release, the proper and the natural place? Why is the church building, as in Champaign a mile or more away (Tr. 158, 242), such a fitting place—so much more fitting that it is

People ex rel. Lewis v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927); *People ex rel. Latimer* v. *Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946); *Gordon* v. *Board of Education of City of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488, (1947) review denied by California Supreme Court.

the "only place for religious education"? Do not the school authorities have the right to determine whether school rooms are available for this purpose without impairment of their primary use for school purposes? Why may the school board not give consideration to the safety of children and their protection from traffic hazards shown in this case to be a very real danger?

The real truth is that the retort "the place for religion is in the home and in the church" is an unfounded assumption that religion is constitutionally quarantined to the home and to the church. This brings us back to a legal constitutional question and involves the interpretation of the words "establishment of religion" in the First Amendment. In doing so the Court may more properly give effect to the fact that the place for religion like justice, ethics, truth or education is everywhere, its only limits being the constitutional right of others.

Akin to the contention that "the place for religion is in the home and the church" is the assertion that the religious education movement is an attempt to "invade the school". Far from "invading the school", religion has first been crowded out of the school, and, secondly, the time heretofore available in home and church has been "invaded" by the school until a further impairment of opportunity for religious training has been effected. Not only has the constant growth of the school curriculum resulted in a gradual lengthening of the school session, but extra-curricular school-connected activities have multiplied until the school dominates the life of a child. When the school contented itself with the teaching of the three "R's" there may have been enough time remaining for family life and church life to include religious training, but, school sponsored athletics, glee clubs, dancing, recreation and education clubs, Boy Scouts, Girl Scouts and other similar and re-

lated activities as well as the increasing burden of homework brought home from the school has ousted the home and the church alike from opportunity for religious teaching. Educators cannot logically complain, nor do they, of the use by religious groups of the small amount of time requested for religious education.

In approaching the question of constitutionality of what has been done here, the Court cannot overlook the fact that it is dealing with an experiment, a great one on a nation-wide scale. A freely tolerant grouping of religious people has been achieved on the community level and sectarian differences have been laid aside in a common and overshadowing purpose to bring religious and spiritual values into focus with secular and material ones.

If given an opportunity, public discussion, experiments, trial and error, will determine its worthwhileness and its fate. It gives great promise of being and well may be the balancing influence which is needed for the evils it is designed to meet.*

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*AMERICAN CHURCH LAW (1933), Carl Zollmann, p. 82, sec. 69:

"Is it any wonder that a remedy is sought by which to bring back religious training to the children of the country? The outcry for such a remedy is universal. It comes from parents, educators, school officials, business men, church men, and from those placed in charge of criminals and juvenile delinquents. Such a remedy is proposed by a system of religious day schools which co-operate rather than compete with the public schools. This has been attempted in various parts of the country, and has already achieved some measure of success. It is, however, still in its swaddling clothes, and its growth will be very largely influenced by the court decisions which will be rendered on its constitutional aspects. Whether or not credit may be given by the public schools for such instruction, whether such instruction may be imparted in the public schools themselves or must be given outside, are questions which

We suggest that the words of Mr. Justice Holmes, speaking for this Court in *Missouri, Kansas & Texas Railway Company* v. *May*, 194 U.S. 267, (1904) are appropriate (p. 270):

> "Great constitutional provisions must be administered with caution. Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts".

We would add to this, that Boards of Education, being in intimate contact with the people, are sensitive to the people's welfare in quite as great a degree as the courts.

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are unsettled and can best be settled by judicial opinions on the constitutionality of such action. One of the essential tasks to be performed, therefore, relates to the work of fitting these new religious schools into the constitutional restrictions of the various states."

To the same general effect is the recent case of *Gordon* v. *Bd. of Edu. of Los Angeles*, 78 Cal. App. 2d 498, 178 P. 2d 488, 494, (1947; review denied by Cal. Supreme Ct.).

III.

The use of school buildings for voluntary religious education classes and the handling of parents' request cards by teachers do not deprive the appellant of property without due process of law in violation of the Fourteenth Amendment.

As pointed out in the jurisdictional portion of this brief, the claim by the appellant that the use of school property was unconstitutional was based, in the Supreme Court of Illinois, solely on the supposed violation of Article VIII, section 3, of the Constitution of Illinois (set forth above in the footnote on p. 92) and upon an Illinois statute almost identical with the constitutional provision (Illinois R. S. 1945, Ch. 122, Sec. 15-14). This has been admitted by appellant on page 3 of her brief opposing the motion to dismiss the appeal. (See p. 5, above.) Since this was her sole reliance in the Court below, therefore no question arises under the Federal Constitution as to this point.

We submit that both because the appellant did not raise, in the Court below, the alleged violation of the Fourteenth Amendment in the taking of her property without due process of law, and because the record shows the appellant's tax burden has not been increased and that the School Board has not made any expenditure in connection with the religious education classes, no substantial Federal question is presented on this point and the appeal should be dismissed. Without waiving this point, we submit the following.

We readily agree that in matters of fundamental religious freedom the amount involved is not the criterion of legality. A differentiation must be made between a small expenditure accompanying an illegal action and a set of

facts where the alleged illegality consists solely of the imposition of the tax. Should the Court find, as we think it should, that the appellant's religious liberty has not been infringed, her complaint that a tax has been levied should be dismissed on the grounds stated by the Court below, *de minimis non curat lex.*

As Mr. Justice Holmes said for this Court in *Noble State Bank* v. *Haskell,* 219 U.S. 104 (1910), which involved a law taxing all banks for a system of state insurance of bank deposits (pp. 110-111): "In answering that question, we must be cautious about pressing the broad words of the 14th Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. And while we should assume that the plaintiff would retain a reversionary interest in its contribution to the fund, so as to be entitled to a return of what remained of it if the purpose were given up (see *Danby Bank* v. *State Treasurer,* 39 Vt. 92, 98), still there is no denying that by this law a portion of its property might be taken without return to pay debts of a failing rival in business. Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place, it is es-

tablished by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what; in its immediate purpose, is a private use. *Clark* v. *Nash,* 198 U.S. 361; *Strickley* v. *Highland Boy Gold Min. Co.,* 200 U.S. 527, 531; *Offield* v. *New York, N. H. & H. R. Co.,* 203 U.S. 372; *Bacon* v. *Walker,* 204 U.S. 311, 315. And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co.* v. *Indiana,* 177 U.S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

It has frequently been held that in the application of the Due Process clause, wherein matters of taxation by a State were in question, absolute uniformity of taxation is not required. In *Madden* v. *Kentucky,* 309 U.S. 83 (1939), Mr. Justice Reed delivering the opinion of the Court and quoting from *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U.S. 232, 237 (1889) said (p. 88):

> "This Court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation', and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies."

We do not for one moment concede that under the First Amendment to the Federal Constitution the granting of equal and non-discriminatory use of public property, for a half hour or an hour a week, to children who wish to study religion on an educational basis and to the extent permitted by the states, may not be treated by

the states as a public purpose. The cases which we have cited holding that this is a religious Nation indicate that in matters of service to the public, states are not forbidden to recognize the existence of religion. Allowing the use of school rooms for religious education purposes is no different today than was the use of the County Court House at Charlottesville for divine worship in 1822, referred to in Thomas Jefferson's letter to Dr. Thomas Cooper, set out on page 72, above, and is not any different than allowing the American Legion, an historical society, or any one of a hundred civic groups to use the school buildings for their meetings.

A religious test is not required as a condition precedent to any such permitted use. It should not be a bar to such use. No religious test is required to admit a student to the voluntary classes; his parents' consent is enough. Neither religion nor lack of it is a test of admission. Neither his religion nor lack of it should lead this Court to deny to him such benefits as may be incident to the mere use of school property which is shown not to increase the tax burden of those who object to the plan.

To say that religious education may not be taught in a school building, solely because it concerns religion, is really to deny that we are a religious nation. We contend that all constitutional provisions must be read against the background of American history which indicates that this is a religious nation. *So long as all religions are treated alike* it cannot be said that the First Amendment prevents whatever incidental aid the cause of religion receives from government. *The First Amendment deals not with taxes,* qua *taxes, but with religious preferences established by law.*

The Declaration of Independence, the Preamble to the Constitution of the United States, and the Preamble to the Constitution of the State of Illinois, all recognize the

existence of the Deity and express gratitude for His blessings. The Ordinance of 1787, Article 3, provided: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."

The Federal Constitutional Convention was not anti-religious. As stated by Professor Edwin C. Goddard in "The Law in Its Relation to Religion," (10 Mich. Law Rev. 161, at p. 166):

> "Every one of its members was a believer in God, and in future reward and punishment, and most of them including the presiding officer, Washington, were church members. Of all its members Franklin has been regarded as least orthodox. And yet, during its deliberations, when it seemed impossible to harmonize the varying opinions, Franklin offered his celebrated resolution, in which he moved that 'Henceforth prayers imploring the assistance of heaven and its blessings upon our deliberations be held in this assembly every morning before we proceed to business, and that one or more of the clergy of the city be requested to officiate in that service.'"

This Court declared in *Holy Trinity Church* v. *United States*, 143 U.S. 457, that this is a religious nation and that the Constitution and statutes are to be interpreted upon the supposition that nothing inimical to religion is intended. In *Mormon Church* v. *United States*, 136 U.S. 1, the court held that polygamy was contrary to the spirit of Christianity and of the civilization which Christianity has produced in the western world. The Court clearly indicated that the tenets of religion were part and parcel of American civilization.

We call attention to the discussion of the history of American constitution law in relation to religion in the *Holy Trinity Church* case, and in *Wilkerson* v. *City of Rome*, 152 Ga. 762, 110 S.E. 895, 20 A.L.R. 1334. As there shown, state legislatures and Congress have long

recognized that incidental benefits to religion may be conferred by public authority so long as no advantage is given to any particular sect, denomination or religion. We also refer the Court to *Nichols* v. *School Directors*, 93 Ill. 61 (1879) quoted on page 72, above.

It should be pointed out specifically that it is not our contention that either parents or pupils have the right to *compel* a Board of Education to permit the use of school property for religious education classes. Our point is, where the Board of Education is willing to allow such use, without discrimination, that its permitting such use is no more the furthering of a private purpose than permitting the schools to be used by civic groups. The school authorities cannot be compelled to allow the use of school property by any such groups. If, however, the Board determines that the school buildings may be used for purposes other than school classes and does not unlawfully discriminate against any group, the fact that a class or public meeting has religion for its subject does not automatically exclude it. It is, we submit, as much entitled to be permitted the use of public facilities as is the Parent Teachers' Association or a study club.

This being a taxpayers' action it is obvious that unless the appellant has shown that her tax burden is increased by the use of school premises for religious education classes she has not made a case entitling her to relief on the theory that the tax burden is an unconstitutional one.

This necessity of proving an increase in tax burden is upon the appellant whether the unconstitutionality of the action of the Board of Education is claimed to violate the "establishment of religion clause" of the First Amendment, or of the due process clause of the Fourteenth, as a taking of private property without due process of law—the latter point being the subject discussed here.

Two courts below, without dissent, determined that as a matter of fact the religious education classes did not increase the appellant's tax burden, and this is supported by evidence in the record that no expense was incurred by the School Board for the religious education classes and that the expense of the public would not be lessened by discontinuing the religious education classes (Tr. 69-70; 274-275).

This was a question of fact which can not be decided in a vacuum. The question of fact having been unanimously determined by two courts ought to be accepted by this Court.

Reese v. *Phila. & R. Ry. Co.*, 239 U.S. 463 (1915).
Just v. *Chambers*, 312 U.S. 383, 385 (1941).
Galloway v. *United States*, 319 U.S. 372 (1943).

The appellant argues (Appellant's brief, pp. 20-25), citing the *Everson* case, that whether the expense be "large or small" it is illegal. Apparently concluding that this excuses all proof that her taxes will be increased in some degree, the appellant does not point out any evidence indicating to any degree of certainty that appellant's taxes will be increased except to criticize in general language the holding of the court below, *de minimis non curat lex.*

The use of the school building for general purposes does not cease because of the religious education classes, nor do the teachers stop their work. It appears from the testimony of one of the teachers that teaching in the Champaign schools is not done by the clock; that the teachers are frequently kept busy with special work for students not attending the classes; and that her salary as a teacher is not based on the number of hours she teaches (Tr. 111-117).

The decision by both courts that no appropriation was made from any public fund to aid any sectarian

purpose was reached under a state constitutional provision already quoted * which is as severe as any prohibition which can be spelled out of the First Amendment to the Federal Constitution, unless, as we contend, the meaning of the First Amendment be expanded to include therein matters not originally intended.

An attempt may be made by the appellant or by friends of the Court to argue in disregard of the record that a theoretical expense which can be allocated to the use of school rooms satisfies the appellant's burden of proving that her taxes will be increased by the free use of school property for religious education classes. Any attempt, without evidence to support it, to allocate expense is as fruitless as trying to determine the cost of furnishing a religious institution with general police and fire protection, and of maintaining streets on which those attending the institution may have access to it. By the juggling of figures, it is perhaps true that those costs could be allocated, theoretically, but such computation would no more prove that the taxing power of the Government had been used unconstitutionally then does the theoretical and unsupported claim that the use of school property has increased the appellant's tax burden.

The statement on page 22 of appellant's brief that the constitution of the State of New York is similar to the constitution of Illinois is incorrect on the subject of the use of public property. The constitution of Illinois does not prohibit the use of public property for religious purposes, whereas Article IX, section 4, of the constitution of New York has an express prohibition against the use of any public property, credit or money directly or indirectly in aid or maintenance of any school under the

* Page 93, above.

control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught.*

The case of *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927), and the *nisi prius* decision and intermediate appellate decision therein (127 Misc. Reports 135; 215 N.Y. Supp. 632; 219 Appellate Division 233; 219 N.Y. Supp. 189), (Appellant's Br., p. 24) arose under the above provision of the New York constitution, which is the reason for the court's emphasis that the released time plan there considered did not involve the use of school property. The cases are authority in our favor for the proposition that the alleged services of the teachers in our case, which consist entirely in handing out and receiving cards from parents, and directing the movement of pupils to and from religious education classes, do not constitute appropriation, payment or donation of public money for a sectarian purpose under a most severe form of constitutional restriction.

The *nisi prius* decision of *Stein* v. *Brown*, 211 N.Y. 822; 125 Misc. 692 (1925), cited on page 23 of appellant's brief,

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* Section 4, Article XI [formerly IX], New York constitution:

> "Neither the state nor any subdivision thereof, *shall use its property* or credit or any public money, or authorize or permit either to be used, *directly or indirectly*, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (Italics ours.)

The last three lines, commencing "but" were added promptly (1938) after the decision in *Judd* v. *Board of Education*, 278 N.Y. 200, 15 N.E. 2d. 576 (1938), 118 A.L.R. 789, holding that furnishing transportation to private and parochial schools was prohibited by this section before amendment.

holding that the printing of cards for the use of a committee on Week-Day Religious Education was an unconstitutional appropriation of money is not applicable here because the evidence affirmatively shows that the only mimeographing work ever done in the school office for the Champaign Council of Religious Education was paid for by that Council (Tr. 117-240).

In the very recent California case heretofore cited of *Gordon* v. *Board of Education of Los Angeles,* 78 Cal. App. 2d 498, 178 P. 2d 488, the District Court of Appeals of Los Angeles, on March 10, 1947, denied a mandamus to compel the Board of Education to discontinue the released-time plan in Los Angeles. The school buildings were not used but the expense of preparing, printing or mimeographing and mailing literature and cards was paid by the public school system. Also, teachers and superintendents of schools were directed to keep attendance records and to oversee the working of the plan. The constitutional provisions of California set forth in the opinion prohibited teaching directly or indirectly any sectarian or denominational doctrine in any of the common schools of the State, and prohibited also appropriations or the granting of anything in aid of any religious sect or sectarian purpose. The court held that a released-time plan did not violate the constitutional provisions mentioned and, referring to *Stein* v. *Brown,* 125 Misc. 692, 211 N.Y. S. 822 (1925), cited in the appellant's brief, held that such case was in effect overruled by *People ex rel. Lewis* v. *Graves,* 245 N.Y. 195, 156 N.E. 663 (1927). Incidentally, the court points out, 178 P. 2d 488, 495, that in the *Everson* case this court held that its jurisdiction to strike down state statutes on the ground that monies raised by taxation were expended for a private purpose, must be exercised with the most extreme care.

The evidence in the record, upon which two courts held

in appellees' favor, is clear that no substantial or even measurable expense is incurred by the school board in connection with the religious education classes.

The parents' consent cards are paid for by the religious education teacher (Tr. 117). Only once were such cards mimeographed by the school office and they were completely paid for. (Tr. 240) The registration blanks and schedule cards by which junior high school students elect to take religious education are not printed especially for this course and there is grave doubt in the record even that the words "religious education" appear thereon. (Tr. 117) If the classes were discontinued there would be no change in the form of the schedule card or in the handling of it. (Tr. 241-242) The "services" of the teachers consist only of the handing out and receiving of consent cards and in directing the movement of pupils to and from the religious education classes.

That the items just listed above do not constitute appropriation, payment or donation of public money for a sectarian purpose is shown by *People ex rel. Latimer* v. *Board of Education of City of Chicago*, 394 Ill. 228, 68 N.E. 2d 305 (1946); *People ex rel. Lewis* v. *Graves*, 245 N.Y. 195, 156 N.E. 663 (1927) affirming 127 Misc. Rep. 135, 215 N.Y. Supp. 632, 219 App. Div. 233, 219 N.Y. Supp. 189, and *Gordon* v. *Board of Education of Los Angeles*, 78 Cal. App. 2d. 498, 178 P. 2d. 488 (1947).

The only respect in which the present case differs from the three cases just cited is in the use of the school rooms for the religious education classes. The reason that this is done in Champaign instead of releasing pupils to go to other buildings is due to the traffic hazard which in turn is due to the distance from the schools of other buildings suitable for such classes (Tr. 158, 242).

The record shows without a doubt and without con-

tradictory evidence that no additional expense is incurred by the district because of the use of school rooms for this purpose during the hours that heat, light, and janitor service would be furnished whether or not religious education classes were held (Tr. 237-243).

The trial judges unanimously found as facts (Tr. 69-70):

> "On the issue whether the religious education courses occasion an expenditure of public funds, or an appropriation of public funds, the evidence shows that no direct appropriation of any kind, or a direct expenditure of money of any kind, is made by the defendant school district for or on behalf of said religious education classes. * * *
>
> "Certain rooms of the school building used by the religious classes are lighted, heated, and furnished. Janitor service therein is furnished while the religious education classes are conducted. No charge is made by the defendant to any person or organization on account thereof. The testimony of the defendant shows that the janitor service, salaries, and so forth, would all be the same, whether the religious education courses were conducted or not. For the most part, the expense of light and heat would be about the same whether the courses were conducted or not. The wear and tear on furniture, due to the religious education classes, so far as the evidence in this case shows, would be negligible.
>
> " * * * So that it may be said that no public funds have been directly appropriated by the defendant for private use. But to some slight extent the defendant has indirectly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth, as above indicated."

Disregarding the unmeasurable items of indirect expenditure under the doctrine of *de minimis non curat lex*, the issue of fact as to the imposition of any added tax on appellant by the religious education class was resolved against her. Her counsel is driven to the argument in this Court (brief, p. 22) that "no tax in any amount,

large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion," (citing *Everson* v. *Board of Education of Ewing Township,* 330 U.S. 1, 16).

We have pointed out in our argument on the meaning of the "establishment of religion" cause of the First Amendment that no law, whether it imposes a tax or not, is invalid under such amendment unless in addition to or as a part of the imposition of the tax, it prefers one religion over another. Furthermore, the test laid down by the Court still requires "a tax". It is still a question of fact whether the appellant's taxes have been or will be increased by the use of school property for the religious education classes. There is nothing intrinsically unbelievable in the testimony of the Superintendent of Schools that such classes do not impose any expense which would not occur in the absence of such classes. If that testimony be true, then no tax burden has been or will be transmitted to the appellant. Since the appellant sues as a taxpayer, it seems clear that even the test of "a tax in any amount, large or small" laid down in the *Everson* case would prevent her from succeeding here.

On page 24 of her brief the appellant quotes the earlier Illinois case of *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 340, 92 N.E. 251, previously discussed, for the proposition that, if sectarian instruction is permitted in school buildings, money used in support of the school buildings would be used in aid of a sectarian purpose. This case was decided in 1910, and if the portion quoted sustains the appellant's position now, it must be treated as overruled by the decision of the Supreme Court of Illinois in the present case.

On page 25 of appellant's brief she argues that "if a half hour of sectarian religious education is proper in public schools during school hours, with the assistance of public school teachers, longer periods must be sustained, if adopted." This is not true. If changes in the plan place a financial burden on the public treasury, the courts are still open.

A plan which in one setting would involve no expense, in another setting might involve expense. A plan which consumes 30 minutes a week is different than one which consumes 30 hours a week. The fact that this case may involve a matter of degree is of no importance.*

We submit that unless other features of the Champaign plan of voluntary religious education be found unconstitutional, it is not made so because of any tax burden on the appellant.

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* Mr. Justice Holmes, dissenting opinion, *Panhandle Oil Co.* v. *Knox*, 277 U.S. 218, 223 (1928).

IV.

No "censorship" of religion is involved in this case.

The appellant introduces her discussion of "censorship of religion by administrative action" by a quotation from the opinion of the Trial Court (Tr. 65):

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings such faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system."

No further reference to the record is made. We think that a fairer statement of the Trial Court's findings is this, also found at page 65 of the transcript:

> "The defendant school district has been willing to grant its permission for the similar, free and equal use of rooms in the school buildings when not in use for school purposes, to any other faith or group which desires to make use of the school rooms belonging to the defendant, for instruction in the tenets of belief or unbelief of such other faith or group."

The Trial Court's findings with reference to this matter were based upon the evidence taken in the cause, a portion of which we set forth below to demonstrate how unsubstantial is the contention of the appellant that any "censorship" has been threatened or exercised by the Board of Education or its agents.

The Superintendent of Schools testified (Tr. 118):

> "I know who teaches religious education in the schools. I do not determine who those teachers are. During the last year or two Miss Chapin told me who was going to teach. I made no objection to her teaching in the school nor have I ever objected to anybody

teaching in the schools. The schools are open to all denominations who want to teach in them."

A moment later, the same witness testified (Tr. 119):

"As far as I know, the class rooms are available to a person who believes in no religion. They are available for the use of political parties during school hours."

On the same transcript page he said (Tr. 119):

"The school buildings are now available to all religious denominations in this community to be used while they are being used by students. I am opening up these buildings to all these people with the permission of the Board of Education. I have not given any thought to whether the schools can furnish sufficient space for all denominations to teach during school hours."

The only thing in the record that even hints at sustaining the contention made by the appellant is found where the superintendent, Mr. Mellon, testified as follows (Tr. 118):

"The Board has the unwritten reservation that the person should be qualified to teach. We would want a qualified person who would know the correct usage of the English language, who would teach in proper English, use good grammar and language; in other words, of the same general type and do the same general type of teaching that a class room teacher would do. I would not consider what religious denomination he belonged to."

We submit that to call these expressions of the Board of Education "censorship" is to do violence to the English language.

What Mr. Mellon obviously meant, taking all of the above excerpts from his testimony together, was that while no restriction whatever had been imposed on the free and equal use of school buildings the Board felt that it was

proper to encourage a teaching standard in the religious education courses equivalent to the teaching standards maintained in the school system.

The appellant does not even contend that this is "censorship" but she apparently bases her claim in that regard upon the following factually erroneous and confusing non-sequitur (Brief, p. 32):

> "If sectarian groups may be permitted to teach in public schools during regular school hours, and as a part of the public school system, the question presents itself as to a censorship controlling either what groups may teach or what they may teach."

This premise is erroneous since the plan is plainly not "a part of the public school system."

Why permitting use of public school buildings by classes in religious education will lead to censorship is left by the appellant wholly to conjecture. Her quotation from *Cantwell* v. *Connecticut*, 310 U.S. 296, at this point in her brief has an extremely obscure connection with anything which either exists in the record or is claimed by appellant to exist there. But it may be inferred that this citation is intended to show a fear on the part of appellant that some sect such, for example, as Jehovah's Witnesses, will be refused permission to use the buildings. This is an wholly unfounded apprehension as will appear from the record itself. With reference to this sect, which appellant's trial attorney (not her attorney in this court) obviously induced to seek permission (during the trial) to use the school buildings, Mr. Mellon said (Tr. 120):

> "Jehovah's Witnesses have used our high school swimming pool for baptismal purposes. They were readily granted that permission and without any rental. No other application to my knowledge has been made by Jehovah's Witnesses for use of property under control of the Board of Education and of course none has been refused."

This is a long cry from the situation that faced the Court in *Cantwell* v. *Connecticut,* 310 U.S. 296 (1939). There a statute required solicitors for religious purposes to seek a certificate of exemption from a state officer. This Court held simply that, where a person had an absolute right to exercise religious freedom, he could not be restrained in such exercise by being required either to procure a license or to procure an administrative determination that his purpose was a religious one in order to obtain an exemption from obtaining a license.

A similar situation existed in *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), and in that case the Court specifically approved *Cox* v. *New Hampshire,* 312 U.S. 569 (1941), and pointedly said at page 110 of the opinion, "nor is there involved here any question as to the validity of a registration system for colporteurs and other solicitors."

In *Cox* v. *New Hampshire,* referred to above, the Court held (p. 576):

> "If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination to time, place and manner in relation to the other proper uses of the street."

In all of these cases, the Court recognized the necessity of permitting the states to impose reasonable regulations upon all persons, regardless of religious affiliation or of the claim on their part that they were exercising their rights of religious freedom, in order to preserve order and to accommodate the use of public property by such persons to similar use by others having equal right to religious freedom.

It may well be that in the case at bar, the Board of Education has an absolute right, in the exercise of its discretion, to prohibit all use of public buildings, but it has

made no claim to do so. At the very most, all that the Board seeks to do is to make certain that the permissive use made will not expose children to instruction on a level of English usage that will interfere with the instruction given in the school curriculum. In making sure that the persons designated to teach the classes are of proper educational qualifications, the School Board through the Superintendent is not "censoring" either the teachers or their teachings but is exercising proper discretion in approving the personal qualifications of the instructors. Indeed, the School Board would be remiss if it were to allow teachers to use the school rooms without any investigation of the moral character and educational qualifications of such teachers.

Again we must refer to the distinction that exists between the acts of the Board of Education and the acts of the voluntary association which has been granted use of the school buildings. No limitation of participation in the activities, even if some were imposed by the latter could possibly constitute a censorship with which the Board could be charged, so long as the Board follows its plan of not compelling all applicants to operate through the Religious Education Council.

CONCLUSION.

This brief is longer than we would ordinarily think proper. We have, nevertheless, felt the necessity of extending it in order to attempt to anticipate and answer whatever contentions may be raised in the briefs of numerous attorneys, who, acting as *amici curiae*, have indicated an intention to file briefs in support of the position of the appellant, but only one of which briefs we

have had the opportunity to examine before completing this brief.

The unusual length of this brief has also been occasioned by the necessity of directing the attention of the Court to highly pertinent interpretative data with which it had apparently not been furnished at the time of the decision of *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, which opinion contains expressions in the majority opinion and language in the dissents which lend encouragement to what we believe to be an erroneous argument as to the establishment of religion clause of the First Amendment. These expressions the appellant now seeks to have this Court enforce as the law of the land.

These factors have resulted in our treating every subject which we believe might be raised by any one, and treating in unusual detail all the historical facts and every circumstance of practical construction or expression of judicial opinion which we felt would cast light upon the true meaning to be assigned to the establishment of religion clause.

We have done this because we cannot know that Your Honors will approve the substantial reasons which we have assigned for disposition of this case upon jurisdictional grounds. Likewise, we cannot know that if jurisdiction is accepted Your Honors will feel obliged to act upon the finding of fact unanimously made by the three trial judges and by the seven judges who reviewed their opinion in the Supreme Court of Illinois.

In the event that the Court accepts jurisdiction of this cause, there will be before this Court the question of determining to what extent, if at all, the States are limited by the establishment of religion clause of the First Amendment in determining their own policies in co-operating with, or aiding and benefiting religion.

It is our respectful suggestion that this is a field heretofore reserved entirely to State power; that subjection of it to Federal control or review will constitute an unnecessary and unwise substitution of national control for state control and that this will tend to mold educational policies into a fixed national pattern which will prevent effective accommodation of the relations between education and religion at the State level where it may be administered in harmony with varying local problems and conditions.

As applied to this particular case, a decision denying to the State the power to confer upon religion even the incidental aid of government will operate to restrict the high right of parents to control the education of their children, which has heretofore been the subject of jealous guardianship by this Court; and finally, that such a decision will necessarily terminate efforts on the State level to provide balancing influences against the increasing emphasis upon materialism and secularism that many sincere persons believe is endangering the very foundations of American life.

In *Everson* v. *Board of Education of Ewing Township*, 330 U.S. 1, 6, this Court said:

> "It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. *Loan Association* v. *Topeka*, 20 Wall. 655; *Parkersburg* v. *Brown*, 106 U.S. 487; *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U.S. 55. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. *Green* v. *Frazier*, 253 U.S. 233, 240. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authori-

ties to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people."

In *Atkin* v. *Kansas*, 191 U.S. 207 (1903) This Court said (p. 224):

> "But it is equally true—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the Courts as embodying the will of the people, unless they are plainly and palpably beyond all question, is violation of the fundamental law of the Constitution."

We respectfully suggest that not only has there been no showing that the action of the State here reviewed is clearly and palpably unconstitutional, but that there has been, in fact, no invasion whatever of any constitutional right to which the appellant may lay claim, and we therefore ask that this Court affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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